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MONTANA CONSTITUTIONAL CONVENTION

1971-1972

THE JUDICIARY

By SANDRA R. MUCKELSTON

CONSTITUTIONAL CONVENTION STUDY NO. 14

PREPARED BY

MONTANA CONSTITUTIONAL CONVENTION COMMISSION

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PREFACE

The delegates to the 1971-1972 Montana Constitutional Convention will need historical, legal and comparative information about the Montana Constitution. Recognizing this need, the 1971 Legislative Assembly created the Constitutional Convention Commission and directed it to assemble and prepare essential information for the Convention. This series of reports by the Commission is in fulfillment of that responsibility.

This study on the judiciary in Montana was written by Sandra R. Muckelston, research analyst. The Commission has authorized publication of the report as approved by the Research Subcommittee on The Judiciary consisting of Commission members Gene Phillips, Kalispell; Leonard A. Schulz, Dillon; William Sternhagen, Helena; Randall Swanberg, Great Falls, and Bruce Toole, Billings. The report analyzes the effects of the judicial article in the present Montana Constitution. Constitutional provisions and trends from other states are used for comparative purposes.

The Commission extends its appreciation to local and state officials who cooperated in the preparation of the study. This report is respectfully submitted to the people of Montana and their delegates to the 1971-1972 Constitutional Convention.

ALEXANDER BLEWETT

CHAIRMAN

The time is ripe for betterment . . . Men are insisting as perhaps never before, that the law shall be made true to its ideal of justice.

Benjamin N. Cardozo

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SUMMARY

CHAPTER I

PERSPECTIVE

A fundamental problem in societal organization is peaceful resolution of disputes. In societies based on law, this responsibility has been delegated to the judicial branch of government. However, the role of the judiciary in American society has been the subject of a philosophical tug-of-war. Some advocated that the judicial branch should be free of dependence on any other branch of government as well as the public. The concept of an independent judiciary was challenged early in the nineteenth century when concern with the extension of judicial activities culminated in moves to check judicial power. The result was popular control of the judiciary, that is, the election of state judges by the public and limited terms in office. Thus, consideration of the judicial article of the Montana Constitution must be weighed in light of two seemingly inconsistent interests: an independent judiciary and popular control of the judiciary. Both will be particularly significant in relation to court administration, judicial selection and in determining which judicial provisions should be self-executing and which should be left to legislative implementation.

Unfortunately, the judiciary is the least known and least understood of the three branches of government, particularly on the state level. Surrounded by a complex network of procedure, structure and technical terminology, the judicial system is cloaked in an aura of mystery for most citizens. Improvement in judicial administration, however, can be accomplished only by citizen involvement. Since the effectiveness of a judicial system depends on the framework of the judicial article, constitutional reform affords Montana citizens the opportunity to create a modern judicial system equipped to cope with the demands of change.

CHAPTER II

JUDICIAL SYSTEMS

The general organization of judicial systems in the United States follows a three- or four-tiered hierarchical pattern. On the federal level, there is a three-tier court structure:

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Supreme Court of the United States (court of last resort), United States courts of appeal (intermediate appellate courts) and United States district courts (trial courts of general jurisdiction). State court systems are similar to the federal structure except they are usually a four-level system. Unlike the federal system, nearly all state court systems include courts of limited jurisdiction.

Montana follows the four-tier system. The five-member Montana Supreme Court hears appeals from district courts, exercises limited original jurisdiction through the issuance of extraordinary writs and has supervisory control over all inferior courts.

The trial courts of general jurisdiction are district courts. There are twenty-eight district judges serving in eighteen judicial districts in the state. Besides exercising general civil and criminal jurisdiction, except in those jurisdictional areas carved out for courts of limited jurisdiction, the district courts hear appeals from police and justice of the peace courts and review actions of various administrative agencies.

The Montana Constitution directs that two justices of the peace shall serve in each township. Justice of the peace courts exercise civil jurisdiction limited by a maximum amount of \$300 and criminal jurisdiction over misdemeanors. In addition, these courts have jurisdiction over some matters concurrent with the state district courts.

While the preceding courts are established in the Constitution, police and municipal courts are statutory in origin. Police courts operate in municipalities with jurisdiction over violations of municipal ordinances and in other areas concurrent with justice of the peace courts. Municipal courts were established by the legislature in 1935 to supplant police courts in municipalities with a population of 20,000 or more; however, this form of court has not been adopted anywhere in the state.

Most judicial offices in the state are elective. Supreme and district court judges are elected on a nonpartisan ballot; election of justices of the peace and police judges is partisan. Qualifications for judicial office vary, but only supreme and district court judgeships require a law degree.

The amount of compensation for all judges is set by the legislature except police judges' salaries which are determined by municipal governments. The state finances the salaries

SUMMARY

of supreme and district court judges; however, the operating expenses of district courts are met by the counties within each judicial district. Expenditures for other courts are paid by counties or municipalities.

CHAPTER III

COURT ORGANIZATION

Two areas of critical concern in writing a judicial article are court organization and court personnel. The former relates to the operating efficiency of the court structure itself without regard to the problems inherent in providing court manpower.

A detailed judicial article in the Montana Constitution, supplemented by legislation, has produced a fragmented judicial system composed of 246 courts. Each court operates as an autonomous unit, financed by multiple sources without centralized administration of the system as a whole. Operational statistics on courts are nonexistent. Clearly, the court structure in Montana does not operate as a coordinated unit.

This type of structural disorganization has been the subject of judicial reform since the beginning of the twentieth century. The impetus of reform in the organization of court systems usually has been the demand for a more efficient adjudication of civil and criminal cases. Taxed by a flood of litigation, the courts have had to look for new procedures and administrative techniques to cope with modern judicial business. Piecemeal reform, however, has not cured the ills, and steps have been taken by some states to reorganize their judicial systems entirely.

The primary objective of structural reorganization has been court unification. In its most simplified form, a court structure involves two levels of jurisdiction: a court of general trial jurisdiction where a case is instituted, the facts are established and a judgment rendered, and a court of appellate jurisdiction where errors in the original proceeding can be corrected. Various factors have interrupted this concept, creating fragmentation. Demands for local administration of justice produced justices of the peace and other local courts. Instances of recurring litigation in the same area of the law produced specialized courts, such

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as those for probate, divorce, traffic offenses and juvenile matters. As more levels of courts were added, functions of the various courts began to overlap. From this functional duplication, a waste of manpower and a proliferation of forms, inconsistent practices and procedures ensued.

The underlying rationale of a unified court system is to create a cohesive unit of court operations by consolidating state courts to produce a simplified judicial structure. Concomitantly the administration of the state judicial system can be centralized by vesting the supreme court, the chief justice, an independent court administrator or a judicial council with administrative control. Consolidation of courts and centralized administration can provide, with the aid of the rule-making power of the supreme court, a vehicle for more prompt, efficient administration of justice.

There is, however, no final consensus as to what constitutes unification. According to some authorities, unification can be approached two ways: by simplifying court structure through consolidation of jurisdictions or elimination of court levels, or by centralizing administrative authority over the operations of the judicial system. Most reform advocates consider structural and administrative unification as part and parcel of a unified judicial system, both necessary to complete the concept of unification. In relation to court structure, one authority on court reform has suggested that the logical result of unification is the establishment of a two-level judiciary -- a single statewide court of justice with a unified trial division and a unified appellate division. The concept of a two-level court structure, however, poses problems when various minor courts exist in a state judicial system.

Minor Courts. Justice of the peace courts are the only courts of limited jurisdiction granted constitutional status in Montana. A major issue is whether this present minor court level should be maintained. Reform of minor courts has taken place in thirty-one other states either by upgrading the qualifications for minor court judges, replacing these courts with another form of court or deleting reference to these courts from the state constitution and leaving reform of the minor court level to the legislature.

The primary objections to the justice of the peace system appear to be:

1. Lack of legal training. Montana and most other

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states with justice of the peace courts do not require justices to have legal training. Authors of a 1967 study of Montana's judicial system contended that the overwhelming majority of justices of the peace and police judges lack the requisite knowledge to decide many of the cases presented in their courts. To compensate for the lack of legal training of these minor court judges, appeals are allowed to the district court. On appeal the entire case is tried anew; this not only adds to the caseload burden of district courts but gives the person charged with a misdemeanor or involved in a minor civil suit the right to have his case heard twice.

2. The fee system as the basis of compensation. Fees or court costs are the sole basis of compensation for about 85 percent of the justices of the peace in Montana. The impartiality of judges operating under the fee system has been questioned.

3. Inadequate courtroom facilities. Since many citizens have their initial contact with the administration of justice in a J.P. court, public esteem for the entire state judicial process may be lessened if this court creates a bad impression. Courtroom facilities are important in providing an atmosphere for the dispensing of justice; however, in 1966 less than 30 percent of justices of the peace in Montana held court in a courtroom. Proceedings were conducted in a newspaper office, railroad depot and private homes.

Furthermore, the Montana study revealed that minor courts are relatively inactive in civil work, criminal work is limited primarily to collection of fines, and justice of the peace courts have an irrational geographical distribution.

The alternatives in relation to justice of the peace courts in Montana seem to be (1) maintain the constitutional status of J.P. courts, (2) delete constitutional reference to these courts, delegating responsibility to the legislature for lower court reform, (3) replace these courts with another form of court or (4) consolidate the jurisdiction of minor courts into one general trial court with auxiliary judicial officers such as magistrates and commissioners, utilized by federal courts and other state systems, to supplement the judicial staff of district courts.

Centralized Administration. Since state court systems are large-scale business operations, application of business

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management principles is necessary. The primary objective in centralizing the administration of all courts within the state is to systematize the operations of the judicial system. An administrative office in the judiciary could provide compilation of caseload statistics, preparation of a budget for the entire judicial system, assignment of judges to equalize workloads, supervision of court personnel and facilities and assistance in the determination of procedures for channeling litigation through the various steps in the judicial process.

Since most of these services are not coordinated on a state-wide basis in Montana, consideration may be given to granting administrative supervision to the supreme court or an outside agency in the constitution. Seventeen states have constitutional provisions vesting administrative authority in the state's highest court. In addition, thirty-five states provide by constitution or statute for the appointment of a state court administrator to work with the supreme court. Nearly all states employ a judicial conference or council to serve as advisory bodies to the courts; however, the office of court administrator is gradually taking over the functions performed by these councils.

An adjunct to administrative authority in a unified court system is the authority to make rules of court administration, dealing with the internal operations of the judiciary, and procedural rules, dealing with the mechanics of litigation. Since there is no express grant of rule-making authority in the Montana Constitution, the power has been exercised by the legislature, which has delegated some authority to the supreme court to make procedural rules subject to legislative modification. Administrative rules may be made by each district court and the supreme court in Montana; however, the district court rules cannot conflict with supreme court rules, which again are subject to legislative modification.

In examination of the practice of other states, the issue posed is whether rule-making power should be vested exclusively in the supreme court, vested in the court subject to legislative approval or veto, or vested exclusively in the legislature. Most authorities advocating modernization of court administration believe administrative rules should be made by the supreme court to enable uniformity of court practices. In the area of procedural rule-making, there are opposing schools of thought. Some believe that it is a judicial function while others believe it is legislative since substantive rights may be affected.

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Court Financing. To some reformists, full state assumption of court expenses seems to be a logical concomitant of a unified judicial system. One observer noted that efforts to centralize administration of a court system can fail if financing depends upon local appropriations.

In Montana, the state finances the salaries of supreme court and district court judges and the operational expenses of the supreme court. Counties bear the costs of district court operations and justice of the peace courts. Municipalities finance salaries of police judges. According to a federal census study, the state assumes only 29 percent of all court costs. However, state-local sharing appears to be the norm in court financing. Only five states pay virtually all the costs of courts. One model article provides for state assumption of all court costs, but permits the legislature to determine a method of reimbursement from political subdivisions for appropriate portions of the cost. The treatment of court financing in the Montana Constitution will depend on whether minor courts are retained or eliminated.

Other considerations in the area of court organization will be whether provision should be made for creation of an intermediate appellate court should the need arise; whether the present composition of the supreme court should be enlarged; whether the use of retired judges as a source of emergency manpower should be constitutionally provided; whether the judge pro tempore provision should be retained; whether the elaboration of jurisdiction, judicial districts and number of judgeships in the present Constitution is necessary, and whether many of the miscellaneous sections of the judicial article could be omitted.

CHAPTER IV

COURT PERSONNEL

Since competent judges are essential elements of an effective judicial system, the problems of court personnel are equally as important as the area of court organization. How to select judicial officers and how to remove those who falter in their duties will be primary considerations.

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Judicial Selection. Debate has flourished over what method is best suited to select a competent judiciary; election or appointment. For almost seventy-five years following independence, executive appointment of judges subject to legislative approval prevailed in this country. However, the winds of change were evident as early as 1793 when Georgia became the first state to adopt the principle of popular election of judges.

Many factors contributed to the growing demand for popular control of the judiciary. First, the decision in Marbury v. Madison, a federal Supreme Court case, established that the court had the power to determine the constitutionality of legislation. Some regarded this extension of judicial power as an infringement on the separation of powers between the judicial and legislative branches. Second, early American judges were compelled to make interstitial law when common law precedents were not applicable to colonial problems. This was regarded as an usurpation of the legislative function. Third, the debt collection and foreclosure of mortgages which occurred after the American Revolution led to open revolt against courts and lawyers. The advent of Jacksonian Democracy advocating control of government by the common man climaxed the argument for popular control of the judiciary. New York's decision in 1846 to adopt the elective method ushered in the era of elected state judges throughout the country. Most of the existing states followed New York's example within a short period and each new state that entered the Union thereafter followed suit. When the control over the judiciary by political parties was recognized, many states instituted nonpartisan elections. For some, however, the elective process in its entirety was an anathema and the call for a new approach to judicial selection was issued. The embryo of merit selection began taking form in the 1930s and was implemented full-scale in Missouri in 1940.

Today there are five main methods of selecting appellate and major trial court judges used by the states: partisan election, nonpartisan election, appointment by the legislature, appointment by the executive and the merit plan. The latter also is known as the Missouri plan, the ABA plan or the appointive-elective plan.

Popular election of judges has been the basis of judicial selection in Montana since statehood. The Constitution of 1889 directs that supreme court justices, district court judges and justices of the peace shall be elected but is silent on the means by which the elections are to be conducted. In 1935 nonpartisan election of district and supreme

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court judges was instituted. It is something of a misnomer, however, to label Montana's method of selecting supreme court and district court judges as "elective." Article VIII, Section 34 of the Montana Constitution provides that vacancies in these judicial positions are to be filled by gubernatorial appointment. Interim appointments in fact have filled more judicial posts than election: of the five supreme court justices presently serving, four were initially appointed to office; of the twenty-eight district court judges, at least three-fourths of them were originally appointed to office. Most of these men have been successfully re-elected, supporting the political adage that it is difficult to unseat an incumbent; thus, the original selection of most of Montana's appellate and trial court judges is not by the people but by the governor.

Popular election of judges still prevails in over half of the states. Partisan elections are used in seventeen states; non-partisan elections are employed in fifteen states. Nine states, Puerto Rico and the federal system allow the executive to appoint judges. Five states use appointment by the legislature. The most recent trend is merit selection of judges, which has been employed in some form or another in fourteen states.

Merit selection combines aspects of both the appointive and elective systems with a nominating commission. The three elements embodied in this plan include:

1. Nomination of slates of judicial candidates by nonpartisan lay-professional nominating commissions;
2. Appointment by the chief executive of local and state government of judges from the slate of candidates submitted by the nominating commission; and
3. Review of appointments by voters in succeeding elections in which judges run unopposed on the sole question of whether their records merit retention in office.

The argument most frequently raised against the plan is that it is "undemocratic" because it deprives the people of the right to decide for themselves what members of the legal profession should sit as judges. In rebuttal, proponents of the plan claim that merit selection gives citizens more voice in the initial selection of judges, through representation on the nominating commission, than now exists in those states where interim gubernatorial appointments fill most judicial posts. Furthermore, proponents claim that merit selection

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removes the judiciary from politics more than any other method.

Qualifications of Judges. Once the method of selecting judges has been determined, the next question is what qualifications for judicial office should be set in the constitution. Should judges of all courts within the state be required to have legal training? Resolution of this issue will depend on whether or not the status of minor courts is changed.

The judicial article of the Montana Constitution prescribes qualifications only for supreme court and district court judges: minimum age (30 for supreme court and 25 for district court); United States citizenship; admission to the practice of law, and state residence (two years for supreme court and one year for district court). More than three-fourths of the other state constitutions explicitly prescribe federal or state citizenship as a prerequisite for office. Residence in the state or district is required in forty states, the number of years ranging from one year to ten years. Forty-one states require judges of higher courts to be members of the legal profession, but the growing trend is to stipulate a certain number of years of legal experience, varying in length from four to ten years.

The problem of judicial qualifications is directly related to which method of judicial selection is chosen. If merit selection with a nominating commission is utilized, the commission may be best equipped to determine what qualities are necessary for Montana judges. The constitution may set out minimum requirements or may merely state that judges "shall possess such qualifications as may be prescribed by law." An alternative to leaving the definition of judicial qualifications to the legislature would be to empower the supreme court to define qualifications through its rule-making power.

Removal and Discipline of Judges. Impeachment is the sole method of removing supreme and district court judges provided in the Montana Constitution. All other judicial officers are subject to removal by legislative provisions. Experience here and in other states indicates that there is a question whether impeachment alone meets the disciplinary requisites necessary to maintain a competent, efficient judiciary. Although the judges' pension plan in Montana requires retirement at the age of 70 in order to receive benefits, there may be instances where retirement is necessary before that age is reached.

Modern innovations in the area of judicial removal and dis-

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cipline procedures are the Court on the Judiciary in New York, Delaware and Oklahoma, and the commission plan, pioneered in California and adopted in twenty-one other states. The Court on the Judiciary is a specially constituted court where removal and disciplinary sanctions are imposed by appellate court judges. The commission plan utilizes judges, attorneys and lay membership which recommends disciplinary measures to the state's highest court. The advantage offered by the commission plan is that investigations are conducted in confidence until a recommendation is filed with the court.

If a procedure for removal and discipline is to be incorporated into Montana's Constitution, either in place of impeachment or in addition to it, the following are basic considerations: Should the constitutional provision create the machinery or should it merely describe the process required and leave implementation to the legislature? Which governmental body should have the ultimate responsibility for removal and discipline of the judiciary? Should the sanctions imposed and grounds for removal be enumerated specifically? Should all judges in the state be subject to the same removal and disciplinary procedures?

Restrictions on Non-Judicial Conduct. State constitutions usually contain sections in their judicial articles restricting non-judicial activities. The objective of such sections is to remove possible conflicts of interest which would affect a judge's objectivity. Questions facing the Convention may be whether restrictions on off-bench conduct should be placed in the constitution or left to legislation, rules of the supreme court or regulations of another agency such as a removal commission. If restrictions are incorporated into the constitution, what should they include? Should these restrictions apply uniformly to all judicial officers?

The judicial article of the Montana Constitution contains three sections which proscribe off-bench conduct of supreme and district court judges. These proscriptions seem to focus on three areas: (1) practicing law as an attorney, (2) holding any other public office, and (3) receiving money or any other article of value for or on account of a judicial position. This latter restriction is contained in a section which also prohibits receipt of allowance or mileage, yet supreme court and district court judges are allowed per diem and mileage by state statutes. The restrictions contained in the Montana Constitution are similar to those provided in other state constitutions; however,

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newer constitutions tend to incorporate prohibited activities into one blanket provision.

Tenure, Compensation and Retirement. Tenure is the length of time a judge serves in office. There are two types: limited tenure (service for a specified length of time after which the judge must be re-elected or reappointed) and lifetime tenure. The Montana Constitution fixes the terms of office of supreme court justices as six years, district judges as four years and justices of the peace as two years. The Convention may wish to consider whether these terms should remain the same, whether tenure of all judges should be stated in the constitution or whether tenure of minor court judges should be left to legislation. Most state constitutions and the federal constitution enumerate the tenure of appellate and trial court judges; state constitutions may fix terms of inferior judges as well. The question of tenure depends upon the method of judicial selection. Judges selected under the merit plan or elected to office serve limited terms in office. Appointed appellate judges frequently enjoy lifetime tenure. The issue of lifetime tenure vs. limited tenure usually revolves around appellate judgeships. The tenure of appellate judges in other states runs the gamut from one year in Vermont to life appointment in Massachusetts and Rhode Island. New Hampshire and Puerto Rico have terms which last until the judge reaches 70 years of age.

Compensation is a major factor in attracting capable persons to the bench and in maintaining the independence and impartiality of judges while in office. The amount of judicial compensation is a legislative, not a constitutional, problem. Usually the only reference to judicial salaries in a state constitution is a clause prohibiting diminution of judicial salaries during terms of office and a clause which directs the state to pay all or certain judicial salaries. The only issue presented here is whether the state should assume the responsibility of financing all judicial salaries, rather than financing only supreme court and district court compensation.

Retirement provisions, along with tenure and compensation, determines the attractiveness of judicial positions. The only constitutional issues involved are whether a mandatory retirement age should be stipulated and whether post-retirement service of judges should be allowed. Since the judges' pension plan allows post-retirement service, it may be superfluous to repeat it in the constitution. As for mandatory

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retirement, the Advisory Commission on Intergovernmental Relations reported that at least twenty-three states by either statutory or constitutional mandate require retirement at age 70. Since retirement by age 70 is required under Montana's pension program if a judge wishes to receive benefits, the Convention must resolve whether this issue should receive constitutional mention.

Clerks of Court and County Attorneys. Two sections of the judicial article in the Montana Constitution are devoted to clerks. The office of clerk of the supreme court is established in one and district clerks of court are defined in the other. The purpose of these sections is to establish the offices as elective and fix the terms of office. The questions raised by the provisions are whether the office should continue to have constitutional status and whether the office should be elective or appointive. The duties of clerks on both court levels are administrative in nature: collecting fees, filing legal papers, issuing writs and other documents and maintaining records. Thus, the office is necessary to the efficient administration of the judicial system. However, centralized administration can be hampered at the lower levels by an elected clerk. Election bestows independence upon an administrative official and allows him to resist cooperation and coordination.

Four state constitutions provide for election of supreme court clerks. In twenty-seven state constitutions, state supreme court clerks are appointed. The Advisory Commission on Intergovernmental Relations reported that in thirty-three states, the clerks of trial courts of general jurisdiction are elected either by statutory or constitutional provisions. However, in some states, such as Alaska, Colorado, Hawaii and New Mexico, trial court clerks are appointed.

The judicial article of the Montana Constitution also establishes the office of county attorney. Questions posed are whether the office should continue to have constitutional status; if so, should the office be established in the judicial article or in another, such as the local government article? Should the geographical unit served by these attorneys continue to be counties or might judicial districts be more realistic subdivisions? Should the office continue to be elective?

Thirty-seven states give constitutional status to prosecuting

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attorneys; in thirty-six of these constitutions, the office is elective. Under New Jersey's Constitution, the county prosecutor is appointed by the governor with the consent of the senate. Approximately twelve states use district attorneys rather than county attorneys.

Two problems related to the issue of district attorney vs. county attorney are the sharing arrangements for prosecutor's salaries and the part-time nature of the office. A recent report on local prosecutors showed that seven states share the cost of prosecutors' salaries with local governmental subdivisions. Twenty-five states require county governments to pay the entire salary while fourteen states assume the full cost of his salary. In Montana the salary is paid half by the state and half by the county. The amount of annual compensation is determined by a legislative schedule based on population and taxable valuation of the county. However, the low pay scale for these offices in Montana causes most county attorneys to resort to private practice in addition to their office responsibilities. The result is part-time attention to the duties of the office. One advantage which may be obtained in consolidating these offices into a district attorney's position is higher compensation since salaries could be pro-rated among the counties within the district and the state.

CHAPTER I

PERSPECTIVE

In a society where the individualist ethic is paramount, competition and conflict are inevitable. Peaceful resolution of conflict becomes a prerequisite to large-scale group organization.¹ Fundamental functions of every state are to protect itself from internal breaches of the peace, prevent undermining of the social order and keep open the avenues of social progress.² In this process, the judiciary plays a prominent role. The courts "provide the instrumentality for the trial of disputes between the individuals and between the state and individuals for the protection of human beings living in organized society."³

ROLE OF THE JUDICIARY

Two concepts underlie any discussion of the judicial branch in relation to the public and to the other branches of government: An independent judiciary and popular control of the judiciary. Both control the scope of power the judiciary may exercise.

To preserve separation of powers and insure the impartiality of judges, and independent judiciary seems necessary. The framers of the federal Constitution, reacting to the abuse of judicial power by English judges who served at the pleasure of the king, recognized the importance of an independent judiciary and provided for lifetime tenure and appointment to the federal bench by the President with the advice and consent of the senate. According to Alexander Hamilton, however, complete independence was not attained:

Whoever attentively considers the different departments of power must perceive that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in capacity to annoy or injure them. The Executive not only dispenses honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the

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purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgment . . . ⁴

Early in the nineteenth century, the doctrine of an independent judiciary was weakened by a view that judges should be accountable to the people. The extension of judicial activity and unpopular court decisions resulted in a fear of judicial power. "A belief grew that judicial independence and lack of responsibility to the people were dangerous and undemocratic." ⁵

[T]he new liberalism was most strongly under way in the new states west of the mountains, where social and political equality had been established by the conditions of life, and where a bold and energetic people were jealous of their local political powers and impatient of legal restraints. This new political force . . . triumphed completely in 1828 with the election of Jackson. He was the living embodiment of the political creed of the frontier people, who believed that everything should be decided according to the popular will.

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[T]he Federal courts [stood] in the way of Jackson, who conceived a popular mandate to be superior to any court's interpretation of the Constitution, and considered himself to be the exponent and the instrument of the popular will. A conspicuous example of that attitude was his open defiance of three separate decisions of the Supreme Court upholding the treaty rights of the Cherokee Indians in Georgia, which he refused to enforce. ⁶

In this period a movement to diminish the authority of courts began. Lifetime tenure and the method of judicial selection were attacked. Only the federal courts survived the onslaught. On the state level, the result was limited terms of office and popular election of judges.

The curtailment of judicial power in the name of popular sovereignty was criticized from its beginning. In 1832

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Alexis de Tocqueville wrote:

I am aware that a secret tendency to diminish the judicial power exists in the United States Some other state constitutions make members of the judiciary elective, and they are even subjected to frequent reelections. I venture to predict that these innovations will sooner or later be attended with fatal consequences; and that it will be found out at some future period that by thus lessening the independence of the judiciary they have attacked not only the judicial power but the democratic republic itself. ⁷

Others have refuted the idea of popular control by defining the role of the judiciary in relation to the other branches of government. One commentator noted:

Popular government is necessarily government by a majority. The danger is always present that a majority of the people at any time may use its powers in an arbitrary manner to oppress the minority. . . . One of the great problems confronting a people in establishing a popular government is that of providing means by which this danger may be avoided. Experience has shown that this can be done in but one way; namely, by entrusting to the courts the duty of seeing that no branch of the government, nor all the branches combined, shall take any action contrary to law or in violation of the rights guaranteed to individuals.

The result of doing this is to give to the judicial branch of government a status quite distinct from that of the other branches. In the first place, it occupies the anomalous position of being at once a branch of government and yet standing outside of, or at least independent of, the government in order that it may restrain the government. Secondly, courts are in the equally anomalous position of being agents of the people and yet not representative of the people in the same way as the other branches, since their duty is not that of carrying out the will of the people, as represented by a majority of such people, but, on the contrary, of protecting the minority,

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no matter how small, whenever their rights are threatened or interfered with by the majority. 8

When President William Taft vetoed a resolution providing for the admission of Arizona and New Mexico as states because their constitutions contained clauses which, in his opinion, failed to adequately protect the independence of judges, he stated:

The executive and legislative branches are representatives of the majority of the people who elect them in guiding the course of the government within the limits of the constitution. They must act for the whole people, of course; but they may properly follow the views of the majority which elected them in respect to the governmental policy best adapted to secure the welfare of the whole people. But the judicial branch of the government is not representative of a majority of the people in any such sense, even if the mode of selecting judges is by popular election. . . . They are not popular representatives. 9

Inherent in the concept of popular control of the judiciary is a belief that judicial decisions should reflect not only substantive law but also the changing economic, social and political theories of society. This theory attributes a policy-making function to the judicial branch. A 1908 presidential address posed the possible conflict between judicial and legislative functions when the courts are required to reflect community attitudes:

The chief lawmakers in our country may be, and often are, the judges, because they are the final seat of authority. Every time they interpret contract, property, vested rights, due process of law, liberty, they necessarily enact into law parts of a system of social philosophy; and as such interpretation is fundamental, they give directions to all law-making. The decisions of the courts on economic and social questions depend upon their economic and social philosophy; and for the peaceful progress of our people during the twentieth century we shall owe most to those judges who hold to a twentieth century economic and social philosophy and not to a long outgrown philosophy. . . . Of course a judge's views on progressive social philosophy are entirely second in importance to his

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possession of a high and fine character. . . . But it is also true that judges, like executives and legislators, should hold sound views on the questions of public policy which are of vital interest to the people.

The legislators and executives are chosen to represent the people in enacting and administering the laws. The judges are not chosen to represent the people in this sense. Their function is to interpret the laws. The legislators are responsible for the laws; the judges for the spirit in which they interpret and enforce the laws. . . . [I]nasmuch as judges are chosen to serve the interests of the whole people, they should strive to find out what those interests are, and, so far as they conscientiously can, should strive to give effect to popular conviction when deliberately and duly expressed by the lawmaking body. . . . But for the courts to arrogate to themselves functions which properly belong to the legislative bodies is all wrong, and in the end works mischief. The people should not be permitted to pardon evil and slipshod legislation on the theory that the court will set it right; they should be taught that the right way to get rid of a bad law is to have the legislature repeal it, and not to have the courts by ingenious hair-splitting nullify it.¹⁰

Thus, consideration of the judicial article of the Montana Constitution must be weighed in light of two seemingly inconsistent interests. An independent judiciary and popular control of the judiciary will be significant factors in relation to administration of courts, judicial selections, qualifications and tenure, and in determining which judicial provisions should be self-executing and which should be left to legislative implementation.

ROLE OF THE PUBLIC

The judicial article of a constitution serves as the foundation of a judicial system. The bones and sinew of the system are its courts and judges. These elements are interdependent. Judges need the court mechanism in order to function, and courts are ineffective without judicial manpower. The problems within one area influence the other:

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The judicial task has many facets and the duties and functions of the judges are far from simple. Recognition that large discretionary powers should be vested in the court to control its procedure and the management of its business presupposes the selection of able, experienced, conscientious and unbiased judges. Improvement of judicial organization and of court procedure is most essential but the relation of the character of the judiciary to these considerations cannot be overestimated. The best organization of the courts will be ineffective, if the judges who man it are lacking in the necessary qualifications. A court cannot exist without a judge and proper administrative supervision of the judicial system as a whole by an able judiciary is of much importance in helping the judge in his fundamental task of administering justice.¹¹

Unfortunately, the judiciary is the least known and least understood of the three branches of government, particularly on the state level. Surrounded by a complex network of procedure, structure and technical terminology, the judicial system is cloaked in an aura of mystery for most citizens. The public is limitedly aware of the product of judicial operations, court decisions, but little attention is focused on the realities of court functions or personnel problems.

Public concern, however, is essential to the effectiveness of a judicial system. The power of courts and judges is "the power of public opinion. They are all-powerful as long as the people respect the law; but they would be impotent against popular neglect or contempt of the law."¹² In effect, public attitude toward the entire legal order of society either enhances or hampers the administration of justice. Citizens judge the law not only by events observed in a courtroom as litigants or members of juries but also by attitudes toward law enforcement officials, toward attorneys who serve as officers of the court and as a liaison between the public and the judicial mechanism, and toward rising crime rates, the spiraling cost of judicial administration and court congestion and delay.

Improvement in judicial administration can be accomplished only by citizen involvement:

[C]ourts are agencies of the government, and fundamental court reform can be achieved only

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by political action. Our . . . courts will never be structured and reinforced to sustain the burdens of the law explosion until it is brought home to the public at large that justice is everybody's business. ¹³

The Constitutional Convention affords Montana citizens the opportunity to create a modern judicial system equipped to cope with problems arising from population expansion, continued technological innovations, increased litigation and shifts in economic base. The ability of the judiciary to meet this challenge will depend on the framework of the judicial article.

CHAPTER I

NOTES

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2. Arthur T. Vanderbilt, Chief Justice of the Supreme Court of New Jersey, Judges and Jurors: Their Functions, Qualifications and Selection (Boston: Boston University Press, 1958), p. 1. Cited hereafter as Vanderbilt, Judges and Jurors.
3. Ibid.
4. Alexander Hamilton, cited in Murphy and Pritchett, Courts, Judges and Politics, p. 13.
5. Vanderbilt, Judges and Jurors, p. 23.
6. Stuart H. Perry, "Politics and Judicial Administration," The Annals of the American Academy of Political and Social Science 169 (1933) : 76-77
7. Ibid., p. 78.
8. W. F. Willoughby, Principles of Judicial Administration (Washington: The Brookings Institution, 1929), pp. 355-356. Cited hereafter as Willoughby, Principles of Judicial Administration.
9. President William H. Taft, Congressional Address, 1911, cited in Willoughby, Principles of Judicial Administration, p. 356.
10. President Theodore Roosevelt, "Annual Message to Congress," Congressional Record 43 (1908) : 21.
11. Vanderbilt, Judges and Jurors, p. 3.
12. Alexis de Tocqueville, cited in Vanderbilt, Judges and Jurors, p. 11.
13. Harry W. Jones, "Introduction," The Courts, the Public, and the Law Explosion, ed. Harry W. Jones (Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1965), p. 6.

CHAPTER II

JUDICIAL SYSTEMS

The general organization of judicial systems in the United States follows a three- or four-tiered hierarchical pattern. Differences arise in the division of jurisdiction among court levels and in the diversity of court personnel.

FEDERAL SYSTEM¹

The Federal Constitution provides: "The judicial power of the United States shall be vested in one supreme court, and such inferior courts as the congress may from time to time ordain and establish."² Thus, Congress may establish or abolish any federal court except the federal Supreme Court.

The judicial power or jurisdiction of federal courts is briefly enumerated in the Federal Constitution. It extends to (1) "all cases, in law and equity, arising under this [federal] constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;" (2) "all cases affecting ambassadors, other public ministers and consuls;" (3) "all cases of admiralty and maritime jurisdiction;" (4) "controversies to which the United States shall be a party;" (5) "controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states, and between a state or the citizens thereof, and foreign states, citizens, or subjects."³

In actual practice, federal court cases are about equally distributed among three types: (1) cases in which the United States is a party; (2) civil cases involving a federal question, and (3) civil cases involving parties with diverse citizenship. The first category includes both civil and criminal cases; the latter are more numerous because federal courts have exclusive jurisdiction in enforcing the federal criminal law. Most of the civil cases in the federal district courts fall within the last two categories. In each of these classes a minimum of \$10,000, exclusive of costs and interest, must be involved in order for the case to be instituted in the district courts.

JUDICIAL SYSTEMS

Supreme Court

The pyramidal structure of the federal judicial system is illustrated in Table 1. At the apex of the pyramid stands the Supreme Court of the United States, consisting of nine justices appointed for life by the President with the advice and consent of the Senate.⁴ One justice is designated chief justice and receives a salary of \$40,000 a year.⁵ Other justices receive an annual compensation of \$39,500.⁶ The officers appointed by the court include a clerk to keep its records, a marshal to maintain order and supervise the administrative affairs of the court, a reporter to publish its opinions and a librarian. Court sessions begin the first Monday of October and continue to the following June.

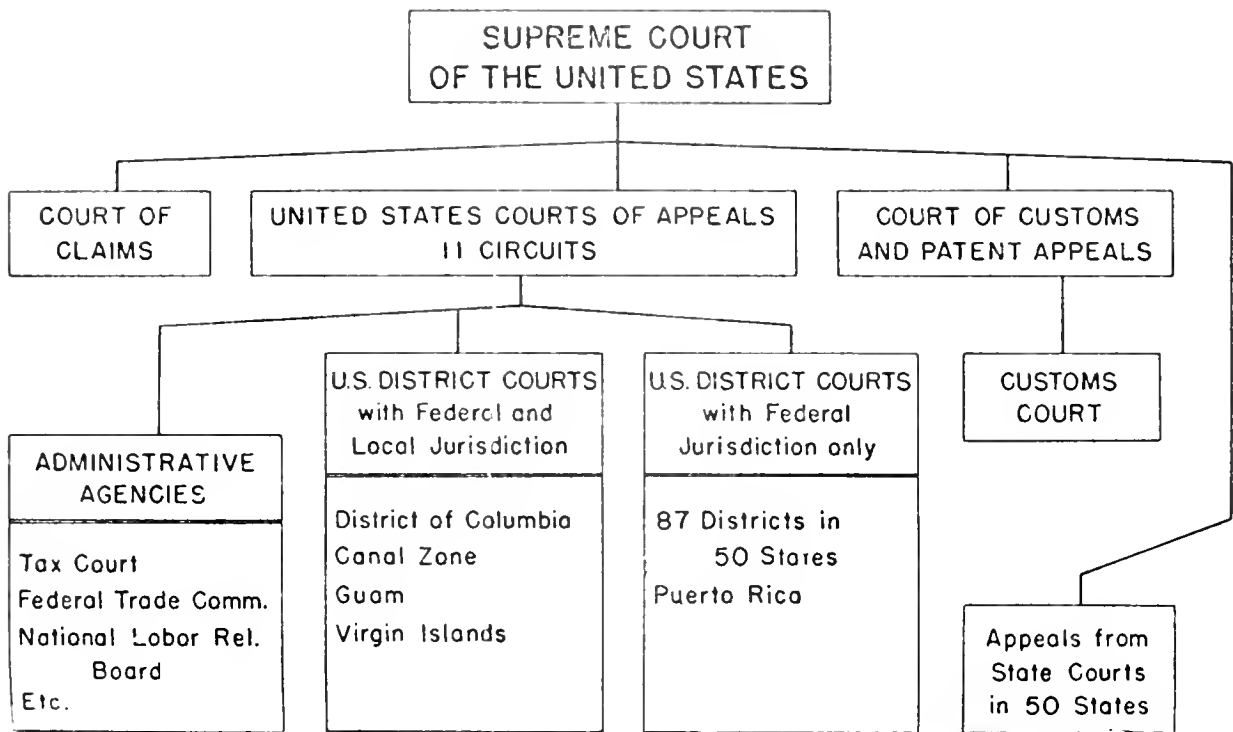
The Federal Constitution does not define the appellate jurisdiction of the Supreme Court; instead, the task is delegated to Congress. By law, the court is vested with discretionary power to decide whether to review a case. This power was granted by Congress in 1916 and greatly increased in 1925; however, the court does not have complete discretion. Where a federal court holds an act of Congress unconstitutional, or where a United States court of appeals holds a state statute unconstitutional or invalid, an appeal to the Supreme Court is a matter of right. Likewise, where the highest court of a state holds a federal law invalid or upholds a state statute which is challenged as unconstitutional, an appeal is a matter of right. In all other cases, even though federal questions are involved, the Supreme Court may exercise discretion in taking or rejecting the case. As a matter of practice, if four of the nine justices vote to take a case the court will grant certiorari and the case will be set down for argument. The extent to which the discretion is exercised is disclosed by the fact that from 1962 to 1965 5,967 cases were filed with the court but only 322 were disposed of with full opinions. Of that number 224, or 69 percent, were appeals from lower federal courts and 98, or 31 percent, were appeals from state courts.⁷

Court of Appeals

The United States courts of appeals are the intermediate appellate courts in the federal judicial system. The courts of appeals review appeals from the federal district courts and the actions of various federal administrative agencies. The courts are located in eleven circuits composed of three or more states, the District of Columbia,

TABLE I

THE UNITED STATES COURT SYSTEM



Source: Joseph F. Spaniol, Jr., The United States Courts, 88th Congress, 1st Session, House Document No. 180 (Washington: U.S. Government Printing Office, 1963), p. 6.

JUDICIAL SYSTEMS

and the territories of Guam, Puerto Rico, the Virgin Islands and the Canal Zone. The geographical size of the circuits vary. The largest is the Ninth, which embraces the states of Alaska, Arizona, California, Idaho, Montana, Nevada, Oregon, Washington and Hawaii. The smallest is the District of Columbia.

The number of judges serving each circuit ranges from three to fifteen depending upon the amount of work in each circuit. The judge with the longest service, who has not reached 70 years of age, serves as chief judge of the circuit. The annual compensation of circuit court judges is \$33,000.⁸

District Courts

The trial courts in the federal system are the U.S. District Courts. There are 101 district courts, ninety-six in the fifty states and one each in the District of Columbia, the Canal Zone, Guam, Puerto Rico and the Virgin Islands. Districts were created to follow state lines as far as possible; hence approximately half of the states are defined as federal districts with but one district court. Thus, there is the United States District Court for the District of Montana which sits in six divisions.⁹ Other states are so populous and have such a volume of judicial business that several districts have been created in them. For example, New York, Texas and California have four districts each.

Nationwide, there are 396 district judgeships.¹⁰ The number of judges serving in each district ranges from one to twenty-seven.¹¹ Their annual compensation is \$30,000.¹² Other district court officers include clerks, federal marshals, referees in bankruptcy, probation officers, court reporters and magistrates.

Special Courts

Three special courts have been created by Congress to deal with particular types of cases. The United States Court of Claims consists of seven judges appointed for life and hears suits on claims against the United States. It consists of seven judges who receive \$33,000 in salary annually.¹³

The United States Court of Customs and Patent Appeals

JUDICIAL SYSTEMS

hears appeals from the Customs Court, the Tariff Commission and the Patent Office. Five judges with lifetime tenure preside. Their annual compensation is also \$33,000.¹⁴ Appeals from the decisions of the Court of Claims and the Court of Customs and Patent Appeals may be heard by the federal Supreme Court.

The Customs Court consists of nine judges appointed for life; it determines controversies concerning the classification and valuation of imported merchandise, and consists of nine judges appointed for life. Their annual compensation is \$30,000.¹⁵

STATE COURT SYSTEMS

Although state judicial systems are similar to the federal system in hierarchical arrangement, none is as simple as the federal court system (see Table 2). Unlike the federal system, nearly all state court systems include courts of limited jurisdiction.

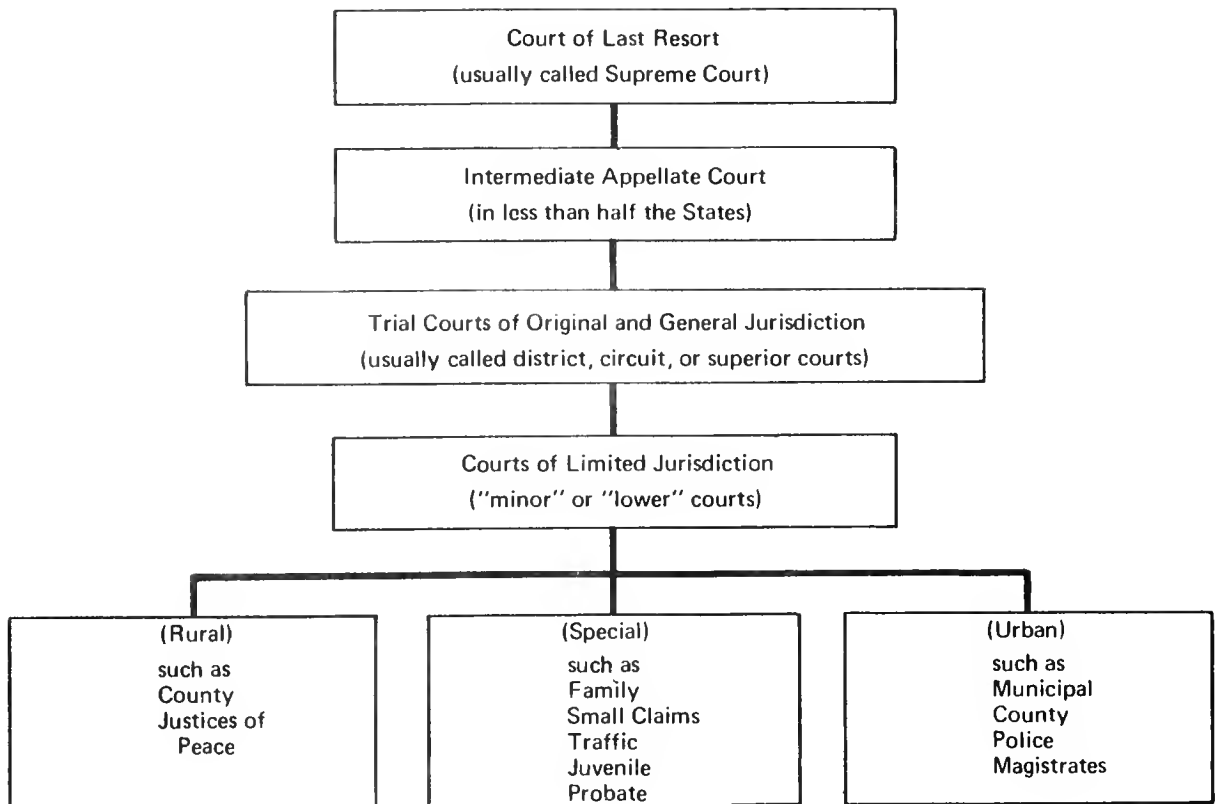
Court of Last Resort

All state constitutions, except New Hampshire's, provide for one court of last resort or ultimate review usually known as the supreme court.¹⁶ As indicated in Table 3, the number of justices serving on the high courts varies from three to nine, including a chief or presiding justice and associate justices.

The court of last resort usually hears appeals from designated state courts, either trial courts or intermediate appellate courts. Most appeals are entertained at the behest of dissatisfied litigants on a case-by-case basis. The scope of judicial review is limited; the case is not retried on the merits. Rather, the court reviews the record of the lower court proceedings to determine whether the lower court committed error in its procedure or in applying substantive law to the facts of the case. Rarely are the facts alone reviewed if there is only a conflict in evidence, although the court may set aside a verdict if it is unsupported by evidence. Another method by which the action of lower courts is reviewed is through the issuance of extraordinary writs, such as mandamus, habeas corpus and prohibition. These writs are directive in

TABLE 2

STATE COURT ORGANIZATION



Source: Advisory Commission on Intergovernmental Relations, State-Local Relations in The Criminal Justice System, Report A-38 (Washington: U.S. Government Printing Office, 1971), p. 88.

TABLE 3

NAMES OF COURTS IN THE STATES AND NUMBERS OF JUDGES, 1970

State	Appellate Courts	No. of Judges	Trial Courts of General Jurisdiction	No. of Judges	Courts of Limited Criminal Jurisdiction	No. of Judges		
Alabama	Supreme Court	9	Circuit	80	County Justice	NA		
	Court of Appeals	3			Recorders	NA		
	Court of Criminal Appeals	3				NA		
Alaska	Supreme	5	Superior	11	District Magistrate	16 45		
Arizona	Supreme Court	5	Superior	50	Justice	91		
	Court of Appeals	9			City and town or police Magistrate	63 NA		
Arkansas	Supreme Court	7	Chancery and Probate Circuit	23	County Justice	73		
				24	Municipal Justice	60		
						300		
California	Supreme Court	7	Superior	416	Municipal Justice	289		
	Courts of Appeal	48				262		
Colorado	Supreme Court	7	District	72	County Municipal Police Magistrate	83 35 115		
	Court of Appeals	6						
Connecticut	Supreme Court	6	Superior Court	35	Common Pleas Circuit	16 45		
Delaware	Supreme Court	3	Chancery Superior	3	Common Pleas	4		
				9	Municipal (Wilmington) Justice	3 52		
Florida	Supreme Court District courts of Appeal	7	Circuit	126	Criminal courts of record	18		
		20			Courts of record	14		
					County Justice	20 68		
					Magistrate	2		
					Municipal	NA		
					Metropolitan Court of Dade Co.	NA		
					Felony court of record	1		
Georgia	Supreme Court	7	Superior	52	Courts of ordinary	NA		
	Court of Appeals	9			City Special civil and criminal Municipal Justice Magistrates	NA NA NA NA NA		
Hawaii	Supreme Court	5	Circuit	17	District magistrate	26		
Idaho	Supreme Court	5	District	24	Justice Police	96 NA		
Illinois	Supreme Court	7	Circuit Court (approx) and 200 Magistrates	360				
	Appellate Court	24						
Indiana	Supreme Court	5	Circuit	84	Municipal	8		
	Appellate Court	8	Superior	48	City Magistrates	60 (est)		
			Criminal	3	Town Justice	4 NA 402		
Iowa	Supreme Court	9	District	76	Superior Municipal Police Justice Mayor's	NA 23 30 530 900		
Kansas	Supreme Court	7	District	60	Common Pleas City County Justice	NA NA NA NA		
Kentucky	Court of Appeals	7	Circuit Court	73	County and Quarterly Justice Police	240 626 200		

TABLE 3 (continued)

State	Appellate Courts	No. of Judges	Trial Courts of General Jurisdiction	Judges	Courts of Limited Criminal Jurisdiction	No. of Judges
Louisiana	Supreme Court Courts of Appeals	7 24	District	107	Special legislative Mayors' Justice Traffic Municipal	NA NA NA NA 4
Maine	Supreme Judicial Court	6	Superior	11	District	18
Maryland	Court of Appeals Court of Special Appeals	7 5	Circuit Courts of Baltimore City	57 21	People's Municipal (Baltimore City) Trial magistrates Committing magistrates	11 16 92 NA
Massachusetts	Supreme Judicial Court	7	Superior	46	Municipal (Boston) District Juvenile (Boston)	9 61 1
Michigan	Supreme Court Court of Appeals	7 12	Circuit Recorder's (Detroit)	116 13	Municipal District Magistrate	NA NA NA
Minnesota	Supreme Court	7	District	70	Municipal Justice	112 474
Mississippi	Supreme Court	9	Chancery Circuit	25 24	County City police Justice	16 NA approx 500
Missouri	Supreme Court Courts of Appeals	7 9	Circuit	103	Court of Criminal Correc- tion (St. Louis) Magistrate Municipal	NA NA NA
Montana	Supreme Court	5	District	28	Municipal Justice Police magistrates	NA 184 107
Nebraska	Supreme Court	7	District	38	Municipal Juvenile Justice Police Magistrate	10 2 NA NA
Nevada	Supreme Court	5	District	18	Municipal Justice	20 56
New Hampshire	Supreme Court	5	Superior	10	District	37
New Jersey	Supreme Court Appellate Division of Superior Court	7 12	Superior County	66 88	County District Municipal courts	32 393
New Mexico	Supreme Court Court of Appeals	5 4	District	24	Municipal Magistrate	2 60
New York	Court of Appeals Appellate Divisions of Supreme Court	7 28	Supreme	221	County Criminal Court (NY City) District City Town & village justice	33 78 87 2,320
North Carolina	Supreme Court Court of Appeals	7 9	Superior	49	District	17
North Dakota	Supreme Court	5	District	19	County County justice Police magistrates	12 41 NA
Ohio	Supreme Court Courts of appeals	7 38	Common pleas	289	Municipal County	156 78
Oklahoma	Supreme Court Court of Criminal Appeals Court of Appeals	9 3 6	District	138	Municipal criminal	NA

TABLE 3 (continued)

State	Appellate Courts	No. of Judges	Trial Courts of General Jurisdiction	No. of Judges	Courts of Limited Criminal Jurisdiction	No. of Judges ^b
Oregon	Supreme Court	7	Circuit	59	District Justice County	29 71 17
Pennsylvania	Supreme Court Superior Court	7 7	Common pleas	234	County Juvenile (Allegheny County) Magistrates'	26 2 28
Rhode Island	Supreme Court	5	Superior	13	City District	NA 13
South Carolina	Supreme Court	5	Circuit	16	County City recorders Juvenile and domestic relations	NA NA NA
South Dakota	Supreme Court	5	Circuit	21	District county Municipal Justice Police Magistrate	22 NA NA NA
Tennessee	Supreme Court Court of Appeals Court of Criminal Appeals	5 9 7	Chancery Circuit Criminal Law Equity	23 44 20 5	County General sessions Municipal Juvenile	NA NA NA NA
Texas	Supreme Court Court of Criminal Appeals Courts of Civil Appeals	9 5 42	District	211	Criminal district Juvenile County County criminal	NA NA NA NA
Utah	Supreme Court	5	District	22	Juvenile City Justice	6 19 NA
Vermont	Supreme Court	5	County	6	District Justice	10 NA
Virginia	Supreme Court of Appeals	7	Circuit Corporation & hustings Chancery, law and chancery, and law and equity	63 24 9	County Municipal	96 35
Washington	Supreme Court Appellate Court	9 12	Superior	88	Justice Municipal Police	187 3 232
West Virginia	Supreme Court of Appeals	5	Circuit	32	Juvenile Justice Municipal	1 119 NA
Wisconsin	Supreme Court	7	Circuit County courts	51 123	Municipal	NA
Wyoming	Supreme Court	4	District	11	Justice courts Municipal courts	NA NA

NA - not available.

^aWhen the same judges preside over two or more classes of courts, only one of the classes is shown. Also, certain types of specialized courts, such as tax courts or industrial relations courts, have been omitted from this compilation.^bFrom American Judicature Society, *Judicial Salaries and Retirement Plans in the United States: 1968 Survey*, (Chicago, 1968).

Source: Advisory Commission on Intergovernmental Relations, State-Local Relations in The Criminal Justice System, Report A-38 (Washington: U.S. Government Printing Office, 1971), pp. 92-94.

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nature, either requesting or prohibiting certain action by a lower court. The highest state court will issue such writs only upon the petition of an aggrieved party who makes application directly to it.

Intermediate Appellate Courts

Congestion of appellate dockets led to the creation of intermediate appellate courts. Twenty states use these courts, generally called courts of appeal. Jurisdiction varies; some courts exercise limited original jurisdiction while all exercise appellate jurisdiction. The jurisdiction of some intermediate appellate courts may be defined in terms of the type of cases they hear, such as the Court of Criminal Appeals and the Courts of Civil Appeals in Texas. All states having intermediate appellate courts also provide for some means of review by the highest state court, often as a matter of right without permission of the intermediate appellate court.¹⁷ The appeal may lie directly from the trial court or from a decision by the intermediate appellate court. The most common types of cases in which a direct appeal to the highest court is allowed are criminal cases involving the death penalty, cases involving the constitutionality of a state or federal statute, cases involving the title to land, civil cases involving an amount in excess of the monetary jurisdiction of the intermediate court and cases involving taxation and revenue.¹⁸

Trial Courts of General Jurisdiction

Trial courts of general jurisdiction have authority to try all types of cases: civil litigation, criminal prosecutions, equity suits and probate matters. All litigation except small claims and petty offenses originates in these courts. In many states the general trial courts also exercise jurisdiction concurrent with inferior trial courts in specific instances.

General trial courts are distributed on the basis of geographical units, usually districts or circuits, in order to provide convenient access to them. One or more judges may serve in each unit depending upon the volume of judicial business. The constitutions of a few states limit the number of judges per judicial area; in the majority, however, the legislature is authorized to increase the number

JUDICIAL SYSTEMS

of judges when necessary.¹⁹ The Florida Constitution automatically requires an increase in the number of circuit judges as the population increases.²⁰ The names of general trial courts vary; the most common designation is "District Court" or "Circuit Court," reflecting geographical divisions. In New York the general trial court is called the "Supreme Court," a name usually reserved to the court of last resort.

In multi-judge districts, the court may be divided further into specialized divisions which handle specific types of litigation, such as probate, juvenile, civil or criminal. In some states there are special courts such as the probate court, criminal court, and in larger metropolitan areas, a domestic relations court. These courts also may be termed courts of limited jurisdiction because their jurisdiction is limited to a particularized area of the law.

In addition to their original jurisdiction, trial courts of general jurisdiction may act as appellate courts to hear appeals from inferior trial courts and to review actions of certain administrative agencies.

Courts of Limited Jurisdiction

The variation of courts of limited jurisdiction ranges from justice of the peace courts, county courts, municipal courts and police courts to magistrates courts and traffic courts. The jurisdiction of these courts is limited by a maximum pecuniary amount in civil cases, and by a maximum fine or sentence in criminal cases. These courts mainly dispose of small claims, conduct preliminary hearings in felony cases, and try and sentence offenders charged with misdemeanors.

No official transcript is made of the proceedings of most courts of limited jurisdiction; hence, they are not courts of record. Accordingly, an appeal is allowed to the general trial court. This appeal, or trial de novo, is a completely new trial of the same case. Then, another appeal is usually allowed from the trial court's judgment to an intermediate appellate court or the court of last resort.

In many states the judges that staff these lower courts are part-time, compensated on a fee basis or salaried,

JUDICIAL SYSTEMS

and need not have the same qualifications as higher court judges.

MONTANA'S JUDICIAL SYSTEM

Article VIII, Section 1 of the Montana Constitution vests judicial power in the senate sitting as a court of impeachment, a supreme court, district courts, justices of the peace and "such other inferior courts as the legislative assembly may establish in any incorporated city or town." In accordance with this provision, police and municipal courts have been established by legislative enactment. The court structure in Montana consists of a court of last resort, a general trial court, and inferior trial courts.

Supreme Court

The court of last resort in Montana's judicial system is the Supreme Court of Montana, consisting of four associate justices and one chief justice. Section 5 of the judicial article of the Montana Constitution (see Appendix A) created a three-member court and empowered the legislature to increase membership to not more than five. In 1919 the legislature added two justices to the court because of an increase in the appellate caseload, bringing the court to its present composition of five.²¹

By constitutional mandate, a majority of the justices is necessary to form a quorum or to pronounce a decision.²² The chief justice presides at all sessions, and, in his absence, the associate justice with the shortest term to serve presides in his stead.²³

To qualify for a seat on the supreme court a person must be admitted to practice law in the state, be at least 30 years of age, be a citizen of the United States and a resident of Montana for at least two years immediately preceding his election.²⁴ Members of the court are elected by the "qualified voters of the state at large" on a non-partisan ballot for six-year terms.²⁵ If a vacancy occurs before the end of the term, the governor appoints a person to fill the vacancy until a justice can be elected and qualified. This election must take place at the next succeeding general election and the judge so

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elected holds office for the remainder of the unexpired term of his predecessor.²⁶ Justices of the supreme court can be removed from office by impeachment;²⁷ all judicial officers forfeit office if absent from the state more than sixty consecutive days.²⁸

Compensation of supreme court justices and district court judges originally was set by Section 29 of the judicial article:

Until otherwise provided by law, the salary of the justices of the supreme court shall be four thousand dollars per annum each, and the salary of the judges of the district courts shall be three thousand five hundred dollars per annum each.

The same section also prohibited the salaries to be increased or diminished "during the terms for which they shall have been respectively elected." A 1964 amendment removed the original salary figures and allowed judges to receive salary increases during their terms in office. Compensation of supreme court justices has risen from \$17,000 in 1967 to \$22,500 in 1971.²⁹ The chief justice receives an additional \$1,500 a year.³⁰

Although the Constitution provides that at least three terms of court are to be held annually, legislation enacted in 1895 requires the court to hold four terms each year beginning on the first Tuesdays of March, June, October and December.³¹ All physical facilities, equipment and personnel necessary for the operation of the court are provided by the state.³²

The jurisdiction exercised by the supreme court (illustrated in Table 4) includes (1) appellate jurisdiction which extends to all cases in law and equity subject to such limitations prescribed by law;³³ (2) limited original jurisdiction which includes the power to issue extraordinary writs of mandamus, certiorari, prohibition, injunction, quo warranto, habeas corpus and all other remedial writs necessary or proper to the complete exercise of its appellate jurisdiction,³⁴ and (3) supervisory control over inferior courts subject to regulation and limitation by law.³⁵ The court also has exclusive jurisdiction to "remove or suspend attorneys and counselors-at-law."³⁶

The Constitution makes no express grant of authority to

TABLE 4

SUMMARY OF JURISDICTION EXERCISED BY MONTANA COURTS

● CONSTITUTIONAL WRITS

Supervisory Control
Other Necessary Writs

Mandamus
Certiorari
Prohibition
Injunction
Quo-Warranto
Habeas Corpus

SUPREME COURT
Chief Justice and Four
Associate Justices

● CIVIL ACTIONS

Equitable Remedies

Claims Exceeding \$300

Claims Less Than \$300
But Exceeding \$50

Claims Less Than \$50

Divorce
Annulment
Bankruptcy
Probate

Forcible Entry And
Unlawful Detainer

DISTRICT COURTS
18 Judicial Districts
28 District Judges

**JUSTICE OF THE PEACE
COURTS**

POLICE COURTS

● CRIMINAL PROSECUTIONS

Felonies

Misdemeanors

MUNICIPAL COURTS*

● MUNICIPAL ORDINANCES

Licenses
Traffic Violations
Municipal Taxes

Original Action Taken →
Appeal Taken →

*No Municipal Courts are in operation in Montana

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the supreme court to make rules of procedure and practice governing judicial administration, but the legislature has authorized the court to adopt rules governing its practice and to make rules of civil and criminal procedure.³⁷ The authority to make rules of criminal procedure, however, expired in 1969.

Although there is no centralized administration by the supreme court over all courts within the state, the court does act in an administrative capacity as the supervisory board over the administration of the Montana Trust and Legacy Fund.³⁸

District Courts

The Montana Constitution established eight judicial districts, each encompassing one or more counties, but delegated to the legislature the authority to decrease or increase the number of districts subject to certain limitations.³⁹ Through legislative enactment,⁴⁰ there are presently eighteen judicial districts in the state served by twenty-eight judges (see Table 5).

District court judges are elected by the qualified voters of their districts on a non-partisan ballot for four-year terms.⁴¹ To be eligible for office, an individual must be at least 25 years of age, admitted to practice law in the state, a citizen of the United States and a resident of the State for at least one year preceding his election.⁴² Following election, a district judge must reside in a county seat in the district for the duration of his term in office.⁴³ Interim vacancies in the office are filled by gubernatorial appointment.⁴⁴ District judges are subject to the same removal and forfeiture provisions as supreme court justices.

Section 30 of the judicial article states:

No justice of the supreme court nor judge of the district court shall accept or receive any compensation, fee, allowance, mileage, perquisite or emolument for or on account of his office, in any form whatever, except the salary provided by law.

Despite this provision, these judges are authorized by statute to receive per diem and mileage when sitting for another district judge or supreme court justice, or when attending a judicial conference in Helena.⁴⁵ Expenses and salaries of district court judges are paid by the state. Their compensation

TABLE 5
JUDICIAL DISTRICTS IN MONTANA

Dist.	Counties	County Population	County Area (Sq. Mi.)	No. of Judges In District
1	Lewis & Clark	33,281	3,476	2
	Broadwater	2,526	1,193	
	DIST. TOTAL	<u>35,807</u>	<u>4,669</u>	
2	Silver Bow	41,981	715	2
3	Powell	6,660	2,336	1
	Granite	2,737	1,733	
	Deer Lodge	15,652	740	
	DIST. TOTAL	<u>25,049</u>	<u>4,809</u>	
4	Missoula	58,263	2,612	3
	Mineral	2,958	1,222	
	Lake	14,445	1,494	
	Ravalli	14,409	2,382	
	Sanders	7,093	2,798	
	DIST. TOTAL	<u>97,168</u>	<u>10,509</u>	
5	Beaverhead	8,187	5,551	1
	Jefferson	5,238	1,652	
	Madison	5,014	3,528	
	DIST. TOTAL	<u>18,439</u>	<u>10,731</u>	
6	Park	11,197	2,626	1
	Sweet Grass	2,980	1,840	
	DIST. TOTAL	<u>14,177</u>	<u>4,466</u>	
7	Dawson	11,269	2,370	1
	McCone	2,875	2,607	
	Richland	9,837	2,079	
	Wibaux	1,465	890	
	DIST. TOTAL	<u>25,446</u>	<u>7,946</u>	
8	Cascade	81,804	2,661	3
	Chouteau	6,473	3,927	
	DIST. TOTAL	<u>88,277</u>	<u>6,588</u>	
9	Teton	6,116	2,294	1
	Pondera	6,611	1,645	
	Toole	5,839	1,950	
	Glacier	10,783	2,964	
	DIST. TOTAL	<u>29,349</u>	<u>8,851</u>	

TABLE 5 (continued)

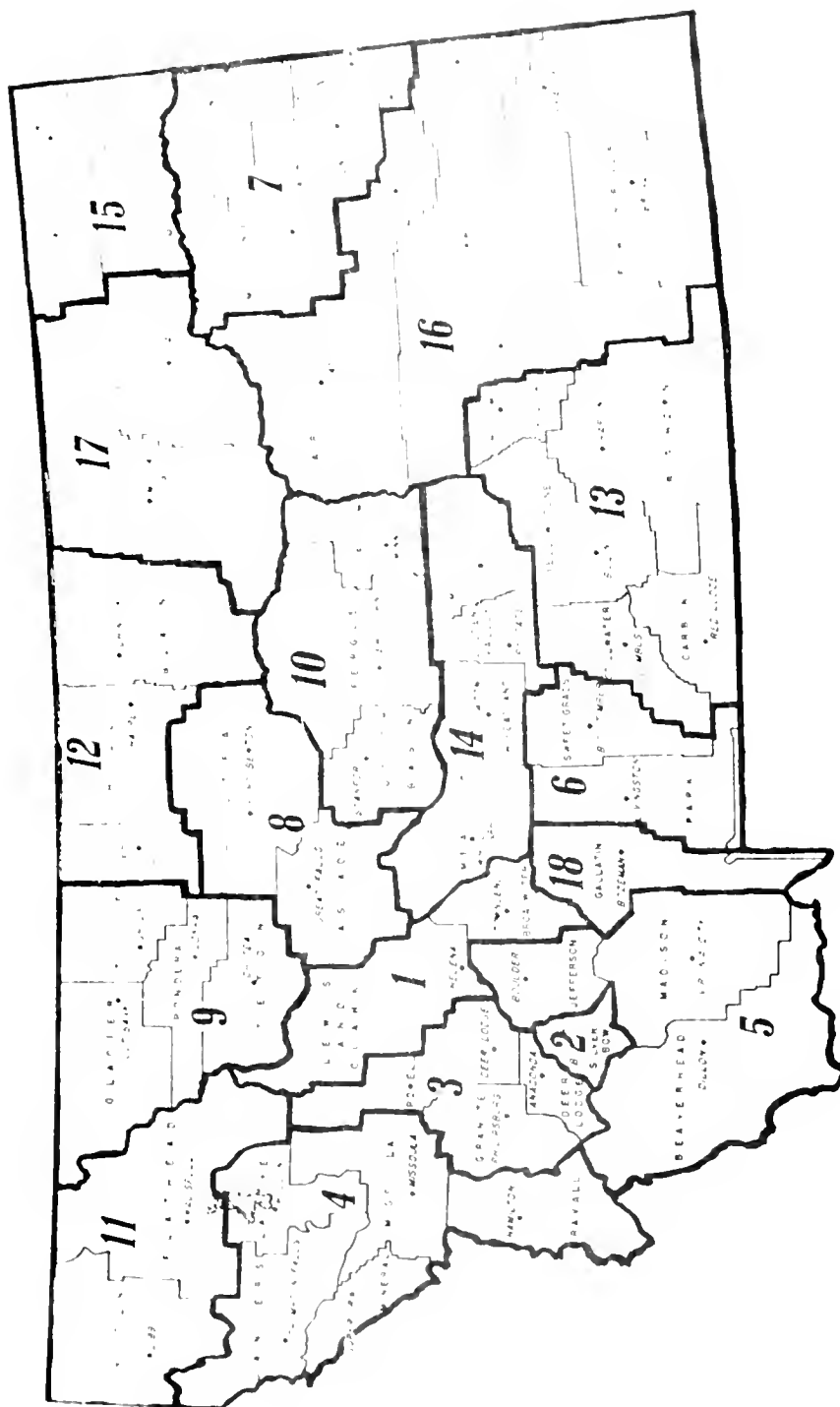
Dist.	Counties	County Population	County Area (Sq. Mi.)	No. of Judges In District
10	Fergus	12,611	4,242	1
	Judith Basin	2,667	1,880	
	Petroleum	675	1,655	
	DIST. TOTAL	15,953	7,777	
11	Flathead	39,460	5,137	2
	Lincoln	18,063	3,714	
	DIST. TOTAL	57,523	8,851	
12	Liberty	2,359	1,439	1
	Hill	17,358	2,927	
	Blaine	6,727	4,265	
	DIST. TOTAL	26,444	8,631	
13	Yellowstone	87,367	2,642	3
	Big Horn	10,057	5,023	
	Carbon	7,080	2,066	
	Stillwater	4,632	1,794	
	Treasure	1,069	985	
	DIST. TOTAL	110,205	12,510	
14	Meagher	2,122	2,354	1
	Wheatland	2,529	1,420	
	Golden Valley	931	1,176	
	Musselshell	3,734	1,887	
	DIST. TOTAL	9,316	6,837	
15	Roosevelt	10,365	2,385	1
	Daniels	3,083	1,443	
	Sheridan	5,779	1,694	
	DIST. TOTAL	19,227	5,522	
16	Custer	12,174	3,756	2
	Carter	1,956	3,313	
	Fallon	4,050	1,633	
	Prairie	1,752	1,730	
	Powder River	2,862	3,288	
	Garfield	1,796	4,455	
	Rosebud	6,032	5,037	
	DIST. TOTAL	30,622	23,212	

TABLE 5 (continued)

Dist.	Counties	County Population	County Area (Sq. Mi.)	No. of Judges In District
17	Phillips	5,386	5,213	
	Valley	<u>11,471</u>	<u>4,974</u>	
	DIST. TOTAL	16,857	10,187	1
18	Gallatin	32,505	2,517	1

Source: County population and area figures from U.S. Department of Commerce, Bureau of the Census, 1970 Census of Population; Number of Inhabitants: Montana (Washington: U.S. Government Printing Office, 1970), p. 12.

TABLE 5 (continued)



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has risen from \$14,000 in 1967 to \$20,000 in 1971.⁴⁶

Most civil and criminal actions originate in district courts. Their civil jurisdiction extends to (1) cases where the amount in controversy, exclusive of interest, exceeds \$50; (2) cases involving the title or right to possession of real property; (3) cases involving the legality of any tax, import, assessment, toll or municipal fine; (4) actions of forcible entry and unlawful detainer; (5) special proceedings for writs of mandamus, quo warranto, certiorari, prohibition, injunction and habeas corpus; and (6) proceedings in insolvency, actions of divorce, annulments of marriage, probate, naturalization and juvenile matters.⁴⁷ Criminal jurisdiction extends to all felony cases and to misdemeanors that have not been delegated to another court by statutory or constitutional provisions.⁴⁸

In exercise of their appellate jurisdiction, district courts hear appeals from justice of the peace and police courts within their districts, and review actions of administrative agencies as provided in laws relating to each agency.⁴⁹ District courts also have the authority to adopt rules of court to the extent that the rules do not conflict with rules of the supreme court or with state statutes.⁵⁰

The terms of district courts vary. In each single-county judicial district, no specific terms are prescribed, but the court always must be open for the transaction of business except on legal holidays.⁵¹ In multi-county districts, there must be at least four terms of court in each county.⁵² When a district court is composed of more than one judge, there may be as many terms as there are judges; however, in these multi-judge districts the court is divided into departments with the business of the court apportioned equally among the judges.⁵³ Expenditures for physical facilities, equipment and personnel are paid by the counties within each judicial district.⁵⁴

Justice of the Peace Courts

Article VIII, Section 20 (Appendix A) provides that there shall be at least two justices of the peace for each organized township of each county. There are 174 justices of the peace serving within the state.⁵⁵ They are elected on partisan ballots by the electors of each township for two-year terms.⁵⁶ To be eligible for the office an individual

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must be a U.S. citizen and a resident of the county for at least one year preceding election or appointment.⁵⁷ Following election or appointment, each justice of the peace must reside in the township in which his court is held.⁵⁸ Interim vacancies are filled by appointment by county commissioners.⁵⁹ Justices of the peace are expressly exempted from the impeachment provisions of the Montana Constitution [Art. V, Sec. 17], but they can be removed proceedings in district court. If the grounds for complaint are willful or corrupt misconduct or malfeasance in office, the proceedings may be initiated by a grand jury, the county attorney for the county in which the justice serves or the attorney general.⁶⁰ However, if the grounds for complaint are illegal collection of fees or refusal or failure to perform official duties, the proceedings may be instituted by a verified written accusation of any person.⁶¹ The trial by jury is conducted in the same manner as prosecution of a misdemeanor.⁶²

The mode of compensation for justices of the peace depends upon the population of their township. All justices charge fees determined by fee schedules established by the legislature.⁶³ Those justices in townships of less than 10,000 population retain all the fees they charge; retained fees are the only compensation they receive.⁶⁴ All other justices of the peace receive a salary paid by the county in which they serve: in townships having a population of 10,000 to 15,000, the annual salary is \$4,200; in townships having a population of more than 15,000 but not exceeding 18,000, the annual salary is \$4,500; and in townships having more than 18,000 population, the annual salary is \$5,500.⁶⁵ In addition, salaried justices of the peace may retain certain designated miscellaneous fees.⁶⁶

The original jurisdiction of justice of the peace courts is limited, and they have no appellate jurisdiction. Their civil jurisdiction includes cases where the amount in controversy does not exceed \$300 in (1) actions arising on contract for the recovery of money; (2) actions for damage to personal property, or for injury to real property where no issue is raised by the defendant concerning the title or possession of the real property; (3) actions for a fine, penalty or forfeiture given by statute or ordinance where no issue is raised involving the legality of any tax, impost, assessment, toll or municipal fine; and (4) actions upon bonds or undertakings conditioned for the payment of money (penalty may exceed \$300).⁶⁷ In actions of forcible entry and unlawful detainer, which involve real property, justices' courts exercise jurisdiction concurrent with district courts.⁶⁸ Another jurisdictional overlap between justice of the peace courts and district courts can be seen

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when the amount of controversy in civil cases is examined. District court jurisdiction begins at \$51 while justice of the peace jurisdiction ends at \$300. Cases involving an amount more than \$51 but less than \$300 may be instituted in either court (see Table 4).

The criminal jurisdiction of justice courts extends to offenses of petit larceny, third-degree assault, breaches of the peace, and misdemeanors punishable by fine not exceeding \$500, imprisonment not exceeding six months, or both.⁶⁹ In felony cases, they serve as examining courts.⁷⁰

Police Courts

Section 24 of the judicial article empowers the legislature to "provide for creating such police and municipal courts and magistrates for cities and towns as may be deemed necessary from time to time. . . ." Acting under this authority, the legislature in 1895 established police courts.

Police judges generally are elected "by qualified electors of the city" to serve two-year terms in cities of the first, second and third classes.⁷¹ In cities with a commission form of government, police judges are appointed by the city commission.⁷² Eligibility requirements are the same as for any municipal office: U.S. citizen, resident in the municipality for at least two years preceding election or appointment and a qualified voter.⁷³ Police judges receive annual salaries fixed by municipal ordinances;⁷⁴ in towns the council may designate a justice of the peace of the township in which the town is situated to act as police judge with an annual salary not exceeding \$100.⁷⁵ In the latter situation, the justice of the peace acts as police judge "in all cases arising out of a violation of ordinances where the town is a party."⁷⁶ Interim vacancies are filled by appointment by the city council.⁷⁷

Police courts, like justice courts, have limited jurisdiction. Their original jurisdiction extends to (1) civil and criminal proceedings for the violation of any municipal ordinance; (2) actions to collect taxes or assessments not exceeding \$300, which are levied for municipal purposes; (3) actions to collect money due to municipalities where such amount does not exceed \$300; (4) cases involving the breach of any official bond given by any municipal officer; (5) proceedings for the recovery of personal property belonging to the city or town when the value of such property

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does not exceed \$300, and (6) actions for the collection of any municipal license.⁷⁸

Police courts have concurrent jurisdiction with justices of the peace in offenses of petit larceny, assault and battery, breaches of the peace, vagrancy, lewd or disorderly conduct, illegal possession of beer or liquor and illegal sales of intoxicating liquors to minors.⁷⁹

Municipal Courts

In 1935, legislation was enacted creating municipal courts for cities with a population of 20,000 or more;⁸⁰ however, no municipal courts are known to exist in the state. Because municipal courts supplant police courts,⁸¹ they exercise the same jurisdiction as police courts and have jurisdiction "coordinate and coextensive" with justice courts of the county.⁸² Municipal courts also are granted jurisdiction in forcible entry and unlawful detainer actions concurrent with the district courts in their respective counties.⁸³

To be eligible for a municipal judgeship, an individual must have the same qualifications as judges of the district court, described previously. In addition, he must be a resident and voter in the city from which he is elected.⁸⁴ Municipal judges are elected on a non-partisan ballot for two-year terms.⁸⁵ They receive an annual compensation of \$3,000 payable from the city treasury.⁸⁶ Expenditures for courtroom facilities, fixtures and supplies are paid by the county in which the court is located;⁸⁷ however, to establish municipal courts the city council must adopt, by a two-thirds majority, the legislative provisions creating these courts.⁸⁸

CHAPTER 11

NOTES

1. Major portions of this description are summarized from Joseph F. Spaniol, Jr., The United States Courts, 88th Congress, 1st Session; House Document No. 180 (Washington: U.S. Government Printing Office, 1963) and Milton D. Green, "The Business of the Trial Courts," The Courts, the Public and the Law Explosion, ed. Harry W. Jones (Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1965), pp. 7-16. Cited hereafter as Green, "The Business of the Trial Courts."
2. United States Const. Art. III, Sec. 1.
3. Ibid., Sec. 2.
4. Ibid., Art. II, Sec. 2.
5. 28 United States Code, Sec. 5.
6. Ibid.
7. Green, "The Business of the Trial Courts," p. 11.
8. 28 United States Code, Sec. 44.
9. Martindale-Hubbell Law Directory, Vol V (Summit, N.J.: Martindale-Hubbell, Inc., 1971), p. 1252. The six federal divisions in Montana are (1) Billings Division including the counties of Big Horn, Carbon, Carter, Custer, Dawson, Fallon, Golden Valley, Musselshell, Powder River, Prairie, Richland, Rosebud, Stillwater, Sweetgrass, Treasure, Wheatland, Wibaux and Yellowstone; (2) Butte Division including the counties of Beaverhead, Deer Lodge, Madison, Powell and Silver Bow; (3) Great Falls Division including the counties of Cascade, Chouteau, Fergus, Garfield, Glacier, Judith Basin, Petroleum, Pondera, Teton and Toole; (4) Havre-Glasgow Division including the counties of Blaine, Daniels, Hill, Liberty, McCone, Phillips, Roosevelt, Sheridan and Valley; (5) Helena Division including the counties of Broadwater, Gallatin, Jefferson, Lewis and Clark, Meagher and Park; and (6) Missoula Division including the counties of Flathead, Granite, Lake, Lincoln, Mineral, Missoula, Ravalli and Sanders.
10. 28 United States Code, Sec. 133.
11. Ibid.
12. Ibid., Sec. 135.

13. Ibid., Secs. 171, 173
14. Ibid., Sec. 213.
15. Ibid., Sec. 252
16. Advisory Commission on Intergovernmental Relations, State-Local Relations in the Criminal Justice System, Report A-38 (Washington: U.S. Government Printing Office, 1971 p. 88. Cited hereafter as ACIR, State-Local Relations.
17. Ibid.
18. Green, "The Business of the Trial Courts," p. 16.
19. ACIR, State-Local Relations, p. 89.
20. Florida Const. Art. V, Sec. 6 (2): "The legislature shall provide for one circuit judge in each circuit for each fifty thousand inhabitants or major fraction thereof according to the last census authorized by law. . . ."
21. Revised Codes of Montana, 1947, Sec. 93-201 to 206.
22. Montana Const. Art. VIII, Sec. 5.
23. Ibid., Sec. 8
24. Ibid., Sec. 10; Revised Codes of Montana, 1947, Sec. 93-701
25. Montana Const. Art. VIII, Secs. 6, 7; Revised Codes of Montana, 1947, Secs. 93-201, 23-4501.
26. Montana Const. Art. VIII, Sec. 34; Revised Codes of Montana, 1947, Sec. 93-209.
27. Montana Const. Art. V, Sec. 17; Revised Codes of Montana, 1947, Sec. 94-5401,
28. Montana Const. Art. VIII, Sec. 37.
29. Revised Codes of Montana, 1947, Sec. 25-501.
30. Ibid.
31. Montana Const. Art. VIII, Sec. 4; Revised Codes of Montana, 1947, Sec. 93-211.
32. Revised Codes of Montana, 1947, Sec. 93-211.
33. Montana Const. Art. VIII, Secs. 2, 3,; Revised Codes of Montana, 1947, Secs. 93-213, 215.

34. Montana Const. Art. VIII, Sec. 3; Revised Codes of Montana, 1947, Secs. 93-213, 214.
35. Montana Const. Art. VIII, Sec. 2.
36. Revised Codes of Montana, 1947, Sec. 93-2026.
37. Ibid., Secs. 93-227, 2801-1 to 2801-4; Title 95, Ch. 28.
38. Montana Const. Art. XXI, Sec. 17.
39. Ibid., Secs. 13, 14.
40. Revised Codes of Montana, 1947, Secs. 93-301, 302.
41. Montana Const. Art. VIII, Sec. 12; Revised Codes of Montana, 1947, Sec. 23-4501.
42. Montana Const. Art. VIII, Sec. 16; Revised Codes of Montana, 1947, Sec. 93-702.
43. Montana Const. Art. VIII, Sec. 33; Revised Codes of Montana, 1947, Secs. 93-702, 703.
44. Montana Const. Art. VIII, Sec. 34.
45. Revised Codes of Montana, 1947, Sec. 93-305, See also Sec. 93-313.
46. Ibid., Sec. 93-303, as amended in Extraordinary Session II, 1971.
47. Montana Const. Art. VIII, Sec. 11; Revised Codes of Montana, 1947, Secs. 93-318, 10-603.
48. Montana Const. Art. VIII, Sec. 11; Revised Codes of Montana, 1947, Sec. 93-318.
49. Revised Codes of Montana, 1947, Secs. 93-319, 72-128.
50. Ibid., Secs. 93-227, 2801-4.
51. Montana Const. Art. VIII, Sec. 17; Revised Codes of Montana, 1947, Sec. 93-315.
52. Ibid.
53. Revised Codes of Montana, 1947, Sec. 93-321.
54. Ibid., Sec. 93-513
55. Montana Highway Patrol, Justices of the Peace/State of Montana (Helena, 1971).

56. Montana Const. Art. VIII, Sec. 20; Revised Codes of Montana, 1947, Sec. 93-401. The Montana statutes requiring non-partisan ballots apply only to supreme court and district court judges [Revised Codes of Montana, 1947, Title 23, Ch. 45].
57. Revised Codes of Montana, 1947, Sec. 93-704.
58. Montana Const. Art. VIII, Sec. 33.
59. Revised Codes of Montana, 1947, Sec. 93-406.
60. Ibid., Sec. 94-5502.
61. Ibid., Sec. 94-5516.
62. Ibid., Secs. 94-5511, 5516.
63. Ibid., Sec. 25-301 to 304.
64. Ibid., Sec. 25-305.
65. Ibid., Sec. 25-306.
66. Ibid., Sec. 25-304
67. Ibid., Sec. 93-408.
68. Ibid., Sec. 93-409.
69. Ibid., Sec. 93-410.
70. Montana Const. Art. VIII, Sec. 21; Revised Codes of Montana, 1947, Sec. 95-1201.
71. Revised Codes of Montana, 1947, Secs. 11-701, 702, 709.
72. Ibid., Sec. 11-3121.
73. Ibid., Sec. 11-713.
74. Ibid., Sec. 11-726.
75. Ibid., Sec. 11-727. Note Montana Const. Art. VIII, Sec. 24 which states: "[P]olice magistrates may also be constituted ex-officio justices of the peace for their respective counties."
76. Revised Codes of Montana, 1947, Sec. 11-727.
77. Ibid., Sec. 11-721.
78. Ibid., Sec. 11-1603.

79. Ibid., Sec. 11-1602
80. Ibid., Sec. 11-1701
81. Ibid., Sec. 11-1716
82. Ibid., Sec. 11-1702
83. Ibid.
84. Ibid., Sec. 11-1704
85. Ibid., Sec. 11-1703
86. Ibid.
87. Ibid., Sec. 11-1705
88. Ibid., Sec. 11-1701.

CHAPTER III

COURT ORGANIZATION

The judicial article of the Montana Constitution vests judicial power in a three-tier hierarchy of courts: court of last resort (supreme court), courts of general jurisdiction (district court), and courts of limited jurisdiction (justice of the peace, police and municipal courts). (See Table 4, Chapter II.). There are three lengthy sections in the judicial article defining the jurisdiction of the supreme court, district courts and justice of the peace courts. Moreover, three other sections are devoted to judicial districts and the number of judges therein. This judicial article, supplemented by legislation, has produced a supreme court, twenty-eight district courts and 217 justice of the peace and police courts; each court operates as an autonomous unit, financed by multiple sources without centralized supervision. No statewide compilation of statistics on court dockets or financing is available. Clearly, the court structure in Montana does not operate as a coordinate, smoothly functioning organization.

For many years this type of structural disorganization has drawn criticism from court reformers as producing an inefficient mechanism for the administration of justice. As early as 1906, Dean Roscoe Pound pointed out in "The Causes of Popular Dissatisfaction with the Administration of Justice" (see Appendix B) that federal and state court systems were archaic in three respects: (1) the multiplicity of courts; (2) preserving concurrent jurisdiction, and (3) the waste of judicial manpower. Pound's primary emphasis was on consolidation of these congeries of courts into a unified system. In 1940 Pound re-emphasized the necessity of judicial reorganization in an essay (see Appendix C) which became the primer for modernization and simplification of existing court systems.

According to Pound, the controlling ideas governing the organization of courts should be unification, flexibility, conservation of judicial power and responsibility. Unification allows judicial machinery to concentrate on its tasks. Flexibility enables the judiciary to meet speedily and efficiently the changing demands upon it. Responsibility is necessary so that someone is held accountable if the judicial organization is not functioning as efficiently as the law and the nature of its tasks permit. Conservation of judicial power is vital for efficiency.

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Instead of setting up new courts for each new task, Pound believed that the judicial structure should be flexible enough to take care of these tasks as they arise. The principle should be not specialized courts but specialized judges. Concurrent jurisdiction and confusing jurisdictional lines between various courts, with consequent litigation at the expense of the merits of the case, could be eliminated. Judicial power could be concentrated in one "Court of Justice," as Pound called it, with three branches: a single, ultimate court of appeal; a superior court of general jurisdiction and a tribunal for small causes "to administer a much higher grade of justice in small causes than that formerly dispensed by justices of the peace. . . ."

Pound summarized the case for unification as follows:

[U]nification would result in a real judicial department as a department of government. . . . In the states there are courts but there is no true judicial department. Again, unification of the judicial system would do away with the waste of judicial power involved in the organization of separate courts with constitutionally or legislatively defined jurisdictions and fixed personnel. Moreover, it would make it the business of a responsible official to see to it that such waste did not recur and that judges were at hand whenever and wherever work was at hand to be done. It would greatly simplify appeals to the great saving not only of the time and energy of appellate courts, but to the saving of time and money of litigants as well. An appeal could be merely a motion for trial, or a modification or vacation of the judgment, before another branch of the one court, and would call for no greater formality of procedure than any other motion. It would obviate conflicts between judges and courts of coordinate jurisdiction such as unhappily have too often taken place in many localities under a completely decentralized system which depends upon the good taste and sense of propriety of individual judges, or appeal after some final order, when as like as not the mischief has been done, to prevent such occurrences. It would allow judges to become specialists in the disposition of particular classes of litigation without requiring the setting up for them of special courts.

Applying Pound's formulation to Montana's judicial system, the

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fundamental issue is whether reorganization of the present court structure is necessary to achieve a simplified, flexible court system. How many levels of courts should be vested with judicial power? Should the legislature be empowered to create additional courts? How should jurisdiction, judicial districts and the number of judges to serve in each district be treated? Should rule-making powers and centralized administration, now absent from the Montana Constitution, be added?

UNIFIED COURT SYSTEM

The impetus of reform in the organization of court systems usually has been the demand for a more efficient adjudication of civil and criminal cases. The shift and increase of population and creation of new causes of action have produced a torrent of litigation being thrust upon judicial systems centuries old. In order to cope with the flood of cases, new procedures, additional manpower and administrative techniques were adopted. Piecemeal reform, however, did not cure all of the ills, and steps have been taken by many states to reorganize their entire judicial systems.

Court unification has been the primary objective of structural reorganization. In its most simplified form, a court structure involves two levels of jurisdiction: a court of general trial jurisdiction where a case is instituted, the facts are established and a judgment rendered, and a court of appellate jurisdiction where errors in the original proceeding can be corrected. Various factors have interrupted this concept, creating fragmentation. Demands for local administration of justice produced justices of the peace and other local courts. Instances of recurring litigation in the same area of the law produced specialized courts, such as those for probate, divorce, traffic offenses and juvenile matters. As more levels of courts were added, functions of the various courts began to overlap. From this functional duplication, a waste of manpower and a proliferation of forms, inconsistent practices and procedures ensued.

The Concept of Unification

The underlying rationale of a unified court system is to create a cohesive unit of court operations by consolidating state courts to produce a simplified judicial structure. Concomitantly the administration of the state judicial

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system can be centralized by vesting the supreme court, the chief justice, an independent court administrator or a judicial council with administrative control. Consolidation of courts and centralized administration can provide, with the aid of the rulemaking power of the supreme court, a vehicle for attaining better utilization of judges, fairer distribution of judicial workloads, greater uniformity and promptness in the administration of justice and more effective supervision of judicial competence.¹

There is, however, no final consensus as to what constitutes unification. The Executive Director of the American Judicature Society, Glenn R. Winters, speaks of structural unification and operational unification.² The former concerns the structural hierarchy of a state judicial system, particularly the number of levels within the system and the jurisdictional divisions between the levels. The latter relates to a system of court administration in which an entity has general supervisory control over the entire judicial system. According to Winters, the court systems of Puerto Rico and Colorado typify the three-tier unified model of structural unification, while California, Kansas, Louisiana and Oregon have achieved operational unification without unifying their court structures.³ Therefore, unification can be approached two ways: by simplifying court structures through consolidation of jurisdictions or elimination of court levels, or by centralizing administrative authority over the operations of the judicial system.

Most reform advocates consider structural and administrative unification as part and parcel of a unified judicial system, both necessary to complete the concept of unification. According to one authority, "the purists are probably typified by the authors of the commentary on the National Municipal League's Model State Constitution,"⁴ who included within the concept of a unified court system uniformity of jurisdiction in each court level, a single administrative head and organization for the entire system, freedom to assign judges at each level and a single set of rules governing practice and procedure.⁵

In the National Municipal League's model judicial article (see Appendix D), all judicial power is vested in a unified judicial system, which includes a supreme court, an appellate court, a general trial court and such inferior courts of limited jurisdiction "as may from time to time be established by law." All courts except the supreme court may be divided into districts as provided by law and into functional divisions and subdivisions as provided by law or by supreme court rule not inconsistent with the law. According to the

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NML model, the supreme court exercises appellate jurisdiction in all cases arising "under this constitution and the Constitution of the United States," and original jurisdiction in matter of legislative districting and gubernatorial succession. All other courts have jurisdiction as provided by law, but the jurisdiction must be uniform in all districts of the same court. The chief justice, as administrative head of the judicial system, may assign judges within each court level or from one level to another, and may appoint an administrative director with the approval of the supreme court. The rules adopted by the supreme court to govern court administration and the practice and procedure in civil and criminal cases may be changed by a two-thirds vote of the legislature.

The model judicial article of the American Bar Association (see Appendix E) differs in its approach to a unified judicial system. It vests the judicial power of the state exclusively in one court of justice which is divided into one supreme court, one court of appeals, one trial court of general jurisdiction, known as the district court, and one trial court of limited jurisdiction known as the magistrate's court. Unlike the NML article, the ABA model gives the supreme court no original jurisdiction. Appeals from a judgment of the district court imposing a sentence of death, life imprisonment, or imprisonment for a term of twenty-five years or more, are taken directly to the supreme court. The supreme court, not the legislature as the NML model allows, determines by rule what other appellate jurisdiction it will exercise.

In the ABA model, the supreme court exercises the authority over other state courts that the NML model grants to the legislature. In the ABA model the divisions and appellate jurisdiction of the court of appeals are determined by supreme court rule. The supreme court also determines the number of divisions of the district court and the number of district and magistrate's court judges. Each district must be a geographical unit fixed by the supreme court and have at least one judge. Every district and magistrate's court judge is eligible to sit in any district. The district court has original general jurisdiction in all cases, except where the supreme court has assigned exclusive jurisdiction to the magistrate's court. The jurisdiction of the magistrate's court is determined solely by supreme court rule. With respect to centralized administration and rule-making powers, the provisions in the ABA model are similar to those in the NML model with two exceptions: under the ABA article, the chief justice's appointment of an administrative director is not subject to supreme court

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approval, and the rules promulgated by the supreme court are not subject to change by the legislature.

Unification in Other States

According to the Advisory Commission on Intergovernmental Relations,⁶ if the criteria of uniformity of jurisdiction, centralized administration, assignment of judges and rule-making power in the supreme court define a unified court system, only the judicial systems of Alaska, Colorado, Hawaii and Oklahoma qualify as unified. Only one of the criteria is lacking in certain other states: Michigan does not vest authority in the highest court to assign judges; Illinois does not give the highest court power to promulgate rules of practice and procedure; the rule-making power of the supreme court in North Carolina is subject to legislative repeal, and New Jersey has not fully consolidated its courts of limited jurisdiction. All these states, however, have centralized administration, which "suggests that this is the key to unification in the minds of many authorities."⁷

Other states which the ACIR cited as having elements of a unified system include Arizona, Connecticut, Idaho, New Mexico, New York, North Dakota, Ohio, Pennsylvania, Vermont and Wisconsin.⁸

Unification and Court Structure

The first section of a judicial article usually declares where the state's judicial power is vested, and the structural framework of a court system is determined by the enumeration of courts within this section. The following constitutional provisions illustrate ways the concept of unification can be stated:

Alaska (Art. IV, Sec. 1) -- The judicial power of the State is vested in a supreme court, a superior court, and the courts established by the legislature. The jurisdiction of courts shall be prescribed by law. The courts shall constitute a unified judicial system for operation and administration. Judicial districts shall be established by law.

Hawaii (Art. V, Sec. 1) -- The judicial power of the State shall be vested in one supreme court, circuit courts, and in such inferior courts as the legislature may from time to time establish. The several courts shall have original and

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appellate jurisdiction as provided by law.

Arizona (Art. VI, Sec. 1) -- The judicial power shall be vested in an integrated judicial department consisting of a Supreme Court, such intermediate appellate courts as may be provided by law, a superior court, such courts inferior to the superior court as may be provided by law, and justice courts.

Idaho (Art. V, Sec. 2) -- The judicial power of the state shall be vested in a court for the trial of impeachments, a Supreme Court, district courts, and such other inferior courts to the Supreme Court as established by the legislature. The courts shall constitute a unified and integrated judicial system for administration and supervision by the Supreme Court. The jurisdiction of such inferior courts shall be as prescribed by the legislature. Until provided by law, no changes shall be made in the manner of the selection of judges of existing inferior courts.

Proposed Arkansas Constitution of 1968 (Art. 5, Sec. 1) -- The judicial power shall be vested in the Judicial Department, which shall consist of the Supreme Court, the Court on the Judiciary, the Circuit Courts, and the Municipal Courts.

North Carolina (Art. IV, Sec. 1) -- The judicial power of the State shall . . . be vested in a Court for the Trial of Impeachments and in a General Court of Justice. The General Assembly shall have no power to deprive the judicial department of any power or jurisdiction which rightfully pertains to it as a coordinate department of the government, nor shall it establish or authorize any courts other than as permitted by this Article.

Puerto Rico (Art. V, Secs. 1, 2) -- The judicial power of Puerto Rico shall be vested in a Supreme Court and in such other courts as may be established by law.

The courts of Puerto Rico shall constitute a unified judicial system for purposes of jurisdiction, operation and administration. The Legislative Assembly may create and abolish courts, except for the Supreme Court, in a manner not inconsistent with this Constitution, and shall determine the venue and organization of the courts.

The constitutional provisions of Alaska, Hawaii and Puerto Rico exemplify the trend in modernizing judicial articles. In Hawaii and Alaska, only two court levels are vested with judicial power while in Puerto Rico's judicial article,

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only its supreme court is given constitutional status. The remainder of the court structure in all those states is defined by the legislature. Furthermore, details such as jurisdiction and judicial districts is left to legislation rather than enumerated in the constitution as is done in Montana's judicial article (see Appendix A).

Most state constitutional provisions create a three or four-level court structure. The NML and ABA model articles provide for a four-level system, although existence of the lowest level in the NML model is optional with the legislature. One authority on court reform has suggested that the logical result of unification is the establishment of a two-level judiciary-- a single statewide court of justice with a unified trial division and a unified appellate division, possibly known as the appellate division of the court of justice:

Under this two-layer court, the appellate division would be divided into as many three-judge panels as the volume of appellate work demands, and these would sit at such times and places as convenience and efficiency dictate. In like manner, the trial division would be divided by administrative rule into as many separate trial units as convenience and efficiency require. All cases filed for trial would be assigned to the one trial division and subdivided administratively to the most appropriate trial units. All appeals would be filed in the one appellate division and similarly be administratively assigned to the individual appellate panel which could most advantageously handle them. Conflicts in decisions among different panels would be prevented or resolved by administrative rules. In no case would any litigant have a right to a hearing before more than three judges, nor to a second appeal.⁹

The concept of a two-level court structure poses a problem when various minor courts exist in a state judicial system. The necessity, if any, of courts of limited jurisdiction will be a primary consideration in attempting to unify a court system.

Status of Minor Courts

Justice of the peace courts are the only courts of limited jurisdiction granted constitutional status in Montana; a

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major issue is whether this present minor court level should be maintained. Several alternatives are available:

1. The constitutional status of J.P. courts could be maintained.

2. Reference to these courts could be deleted from the the constitution. If the legislature is empowered to create inferior courts as Section 1 of the Montana judicial article presently provides, then justice of the peace courts could be re-established or replaced by statutory law. If, on the other hand, the legislature is not empowered to create additional courts, judicial power would be vested only in the supreme court and the district courts. The district courts could be allowed to sit in divisions or branches and hear matters now heard in J.P. courts.

3. The minor courts could be replaced, perhaps with another type of court such as the magistrate courts mentioned in the ABA model article (see Appendix E).

An issue underlying consideration of minor courts is what authority should be delegated to the legislature in implementing a constitutional judicial article. Should the structure of the state's judicial system be left to legislative implementation, frozen into constitutional provisions, or left to the judiciary itself to implement through rule-making powers?

What is the function of a constitution? Is it to outline a frame of government, or to provide all the minutiae of governmental operation? Why do the framers of constitutions assume that all wisdom is theirs, and that future generations are likely to have none? With respect to the judiciary, do they fear that the legislature would refuse to provide courts for the administration of justice; or--providing courts--would fail to give us judges; or--giving us courts and judges--would fail to provide clerks? Such a fear seems rather fantastic in view of the large number of "other" courts which have been established. Apparently there is no concern that too many courts may be created, since the power to erect new courts is practically universal.

Is there a fear that unless certain courts are guaranteed by the constitution they may be abolished or consolidated with others? It seems

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probable that this is the explanation. Independence from the legislature, freedom from administrative control, impregnability against abolition or consolidation--these are apparently the reasons why constitutional status is desired. And who desires this status for the courts? One suspects that it is the courts themselves, as it is difficult to see why the people should be interested in setting up a series of semi-independent bodies which, because of such status, defy attempts to procure coordination and administrative control, result in intolerable conflicts in jurisdiction, delays in litigation, and duplication of court facilities and personnel, and render the administration of justice unbusinesslike and inefficient.

When one reads the state constitutions and observes the number of institutions--judicial, administrative, and political--with the large number of officials attached to them, that are given constitutional status, the conclusion is inescapable that in many respects these documents which we have been taught to venerate have been the means by which there has been set up a galaxy of vested interests. It is a disturbing thought, but worthy of reflection.¹⁰

Justice of the Peace Courts

The office of justice of the peace is a relic of medieval England, where knights were nominated to preserve the peace in local areas as early as 1195. In 1327 King Edward III assigned prominent citizens in each county to act as conservators of the peace, their primary duty being to administer justice in minor matters since the king's assize judges were not usually available immediately. In keeping the peace, these justices were limited to handling minor criminal offenses; they were not granted civil jurisdiction. By the sixteenth century justices in England were assisted by a clerk of the peace, who was generally a lawyer advising the justice on matters of law and court practice. When the office of justice of the peace was established in America by English colonists, justices appointed by the governor still were not required to have legal training. They gradually acquired limited civil jurisdiction and finally came to be elected officers. Justices of the peace in Montana can be traced to 1864 when Congress created the Montana territory and made provision for these courts. Upon statehood the Montana Constitution gave justice of the peace courts constitutional status.¹¹

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Widespread disaffection with these inferior courts began in the first part of the nineteenth century.¹² In 1934 one critic observed:

The justice of the peace is a universal and universally condemned, American institution. It is doubtful if a more striking example of cultural lag can be found in the political field than the attempt which is made in most of our 48 States to serve the ends of justice in the 20th century by a medieval English instrument. The system has no defenders and few apologists. The only persons actively desiring its continuation are those who profit from its operation in some way. And yet, though there are sporadic waves of reform, in most States the system goes along substantially unchanged.¹³

According to an Iowa judge, "justices of the peace should have left the American scene with player pianos and button shoes."¹⁴ Reform began as early as 1936 but significant changes throughout the United States did not occur until the 1950s and 1960s.

Methods of Reform. Change in the justice of the peace system has been effectuated either by replacement of the office with another court structure or by improvement of existing courts.

States have used various means to replace the courts:¹⁵

1. A constitutional revision or amendment is adopted which specifies that after a certain date, J.P. courts shall cease to exist. The same provisions may indicate methods of replacement; for example, they may stipulate that there shall be a period of years between the effective date of the constitutional change and the date of abolition during which the legislature must devise a new lower court system.

2. The constitution is changed to grant the legislature complete power over J.P. and other minor courts; thereafter, legislation is enacted repealing the J.P. structure, either by separate changes over a number of years or by a single comprehensive reorganization. The constitutional and legislative changes may be parts of a single reform movement or may be separated by a long period of time, as in the case where an early constitution of a state gave complete

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power over inferior courts to the legislature but reform of lower courts did not begin until recent years.

3. If permitted by the state constitution, minor courts may be abolished by legislative acts that remove their criminal and civil jurisdiction or reduce it to insignificance. Displacement of minor courts (by creating new courts that have jurisdiction concurrent with justice of the peace courts in order to draw business away from the J.P.s), was a method popularly employed until the last decade. This approach has several disadvantages:

First, if the new courts are not substantially better than the ones they replace, the result is a greater number of courts with fragmented, overlapping jurisdiction that must be reformed. Second, if new courts are each separately created, as has happened for cities in some states, confusion over jurisdictional limits and procedural powers is increased and the goal of central administration becomes more remote. Third, if the jurisdictional power of the displaced courts is not repealed, there remains the danger that some justices, outside effective control, will use this power for private ends and establish a highly profitable "business" in fines for traffic violations or the collection of small debts.¹⁶

Furthermore, the displacement approach merely adds to the multiplicity of courts, hindering any attempts towards court unification.

4. New constitutional provisions may be adopted which integrate the jurisdiction of inferior courts into the courts of general jurisdiction and allow the appointment of matistrates or commissioners to assist judges when necessary. These commissioners or magistrates may be required to have law degrees or training in the judicial duties to be assumed.

Improvement also can be obtained by reforming weaknesses in the present system. Such reforms might include:

1. Requiring that to be eligible for office a person either be a lawyer or undergo specific training in preparation for judicial duties;

2. Replacing the fee method of compensation with salaries, particularly in criminal cases and in urban areas where the justice serves full-time;

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3. Providing for the supervision of J.P. and other courts of limited jurisdiction by a court administrator or a higher court, which fixes responsibility on the justice to keep adequate court records and fiscal accounts and permits flexible assignment of justices;

4. Revising J.P. procedures to conform with modern codes adopted for courts of greater jurisdiction and introducing special, abbreviated procedures for small money claims; and

5. Requiring state or local governments to furnish justices of the peace with adequate courtroom facilities and personnel.

J.P. Reform in Other States¹⁷

Alaska: In 1959 a variegated pattern of minor courts was converted to a system of district courts established by the legislature, integrated with the rest of the state judiciary and supervised under the authority of the state supreme court. The district courts are served by magistrates and deputy magistrates appointed by judges of the superior court. Although both officers are salaried, magistrates must be legally trained and work full-time while deputy magistrates, who exercise less jurisdiction, need not be attorneys or devote full-time to their office.

California: In 1950 a series of legislative and constitutional changes replaced a system of minor courts including six types of city courts and two classes of township courts with a uniform system of municipal and justice courts. The legislature established districts each having a single court: a municipal court in districts with populations of 40,000 or more, a justice court in districts with a population less than 40,000. Municipal courts were granted civil jurisdiction up to \$3,000 and criminal jurisdiction in cases involving crimes below a felony. Justice courts were granted civil jurisdiction up to \$500 and criminal jurisdiction in low-grade misdemeanors. Municipal judges were required to have five years experience in the practice of law; justice court judges were required to be admitted to the practice of law or to pass the qualifying examination prescribed by the state judicial council.

Colorado: A constitutional amendment approved in 1962 abolished all justice of the peace courts, and legislation passed in 1964 organized a system of county courts for small cases. County court judges are required to be lawyers in the larger counties, while laymen who have received some training in their judicial duties are permitted to take office in

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smaller counties. All judges are elected and salaried, but only in the larger counties are they required to serve full-time. County court jurisdiction extends to civil cases involving \$500 or less and to all misdemeanors.

Connecticut: 1959 legislation abolished J.P. and other minor courts and created a system of circuit courts. Appointed by the governor for four year terms, all circuit court judges are salaried, must be admitted to the Connecticut bar and may not engage in other work. Circuit court jurisdiction extends to most misdemeanors, to civil cases up to \$500 and to proceedings involving family relations.

Delaware: Legislation enacted from 1964 to 1966 completely revamped the justice of the peace courts. Fees were replaced with salaries; justice courts were given statewide jurisdiction. The courts were placed under the supervision of the chief justice of the supreme court. A deputy court administrator supervises the operations of the justice of the peace courts with authority to assign justices where needed.

Florida: In 1944 the constitution was amended to permit counties to abolish J.P. courts by referendum and replace them with other minor courts. More than one-third of the counties abolished the courts. In some of the counties where the justice of the peace remains, special acts have been passed which authorize salaries, replace fee schedules with a single filing fee or require justices to be attorneys.

Idaho: In 1959 the legislature replaced the fee system for compensating justices of the peace with provisions for salaries set by county commissioners. The election of justices was superseded by provisions for appointment by county officers with district court approval. In 1962 the judicial article of the constitution was amended to remove all reference to J.P. courts. In 1969 the legislature established magistrate divisions to assist existing district courts, replacing the municipal, justice and probate courts. Magistrates are appointed on a non-partisan basis by a judicial commission. Certain matters may be heard only by magistrates who are attorneys; however, laymen may serve as magistrates if they have a high school education and attend a special institute. Magistrates are salaried officers.

Illinois: In 1962 a revised judicial article was ratified which consolidated minor court jurisdiction into a statewide system of circuit courts staffed by circuit judges and magistrates. Circuit courts replaced a complex network of courts which included circuit, superior, criminal, justice of the peace, police magistrate, municipal, city, village

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and incorporated town courts. Each circuit court is under the supervision of the chief judge of the circuit, who, in turn, is subject to the supervisory powers of the supreme court. Jurisdiction of the circuit courts includes all justiciable matters. Magistrates are appointed by circuit judges, required to be attorneys unless none is available in the circuit, and serve full-time on a salaried basis. Jurisdiction of magistrate courts has been set at a maximum of \$5,000 in civil cases and \$1,000 fine or a year's imprisonment in criminal cases.

Kansas: From 1965 to 1969, the Kansas Legislature took steps which in effect abolished justice of the peace courts by reducing their jurisdiction to \$1.00 or less in all areas where there were city courts, county courts or other minor courts. The jurisdiction of city courts was expanded and magistrate courts were established with jurisdiction of civil cases not exceeding \$3,000 and limited criminal jurisdiction.

Louisiana: In 1956 justices of the peace in wards within cities of more than 5,000 population were abolished and replaced by city judges who are required to have practiced law in Louisiana for five years prior to taking office.

Maine: Legislation in 1961 replaced justice of the peace and municipal courts with a unified statewide system of district courts. Fourteen full-time district judges, sitting in eleven districts, replaced fifty part-time municipal court judges and twenty-four trial justices. In addition to matters formerly handled by these minor courts, the district court was vested with jurisdiction over domestic relations cases and civil suits not exceeding \$1,200. The district court system is administered by the chief judge of the district court and the finances are controlled by the state treasurer. District court judges must be attorneys and serve on a full-time, salaried basis.

Maryland: A 1970 constitutional amendment abolished justice of the peace and magistrate courts as of July 5, 1971, and replaced them with a uniform system of district courts.

Michigan: The judiciary article of a new constitution adopted in 1963 abolished all justice of the peace courts and circuit court commissioners and directed the legislature to create a new minor court system within five years. Thereafter the legislature provided for a uniform system of district courts supplemented by magistrates appointed by district court judges.

Minnesota: In 1956 all constitutional references to justices of the peace were removed. Thereafter probate courts were

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given the jurisdiction of municipal courts in sparsely populated counties, thus displacing the J.P. courts. In 1963 a unified municipal court for Hennepin County (Minneapolis) staffed by fourteen full-time, salaried judges was created to replace thirty-six part-time justices of the peace and fifteen municipal court judges. The court's civil jurisdiction extends to cases involving claims of up to \$4,000 and appeals go directly to the supreme court rather than the district court (trial court of general jurisdiction).

Missouri: In 1945 all justices of the peace were replaced by salaried, legally trained, full-time magistrates. The fee system of judicial compensation was abolished. The magistrate courts have countywide jurisdiction in civil cases limited by a maximum pecuniary amount, in juvenile cases, in traffic cases except in the large cities and in probate cases in those rural counties where the probate and magistrate courts are combined.

Nebraska: In 1970 all references to justices of the peace were removed from the constitution.

New Hampshire: In 1957 the civil and criminal jurisdiction which justices of the peace exercised concurrently with other state courts was removed, leaving justices with only ministerial functions. In 1963, thirty-seven of the existing municipal courts were changed to district courts; the remaining municipal courts were abolished. The district courts were granted criminal jurisdiction in cases involving fines up to \$1,000 or one year imprisonment or both, exclusive civil jurisdiction up to \$500 and concurrent civil jurisdiction with the superior court (general trial court) up to \$1,500. District court judges are salaried, must be attorneys wherever possible and, in populous areas, are not permitted to practice law.

New Jersey: Following revision of the judicial article in 1947, the legislature in 1948 abolished all existing minor courts and replaced them with a system of county-district and municipal courts which operate under the direct supervision of the state supreme court. Although some municipal court magistrates are not full-time, all judicial officers are salaried and must be admitted to practice law.

New Mexico: In 1961 justices of the peace were placed under the control of a court administrator. Under 1963 legislation, a conference of justices of the peace to discuss means of improving judicial administration in justice courts was established. Supervision and financial support of justice courts was transferred from the county commissioners to the state court administrator. Criminal jurisdiction of justice courts

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was limited to certain petty misdemeanors, and justices were required to attend authorized training schools. In 1966 a constitutional amendment was adopted which abolished justices of the peace courts and established magistrate courts to exercise limited jurisdiction. The fee system of compensation also was abolished.

New York: Although the justice of the peace remains a constitutional court, several constitutional and legislative changes have upgraded the office. All justices of the peace and police judges not admitted to the practice of law must complete a training program prescribed by an administrative board. A constitutional amendment adopted in 1962 permitted the legislature to determine the judicial authority of justice courts and, within certain limits, to abolish them. Thereafter, the legislature enacted provisions whereby local governments may adopt a Uniform District Court Act to replace J.P. and other inferior courts.

North Carolina: A revised judicial article, ratified in 1962, replaced justice of the peace and other minor courts with district courts. District court judges are elected for salaried, full-time service and magistrates may be appointed by superior court (general trial court) judges to act as part-time salaried officers of the district court. The chief judge of the district court is responsible for the administrative supervision of the courts in his district. The district court has jurisdiction over civil cases where the amount in controversy is \$5,000 or less, over criminal cases below the grade of felony, over domestic relations cases and exclusive jurisdiction over juveniles. Magistrates exercise jurisdiction limited to minor misdemeanors and to small claims assigned by the chief judge.

North Dakota: By legislation effective in 1961 justices of the peace were replaced by salaried county justices. County commissioners were authorized in their discretion to establish a system of elected county justices. Although these justices are usually part-time, they must be licensed to practice law in the state.

Ohio: In 1957 the legislature replaced justice of the peace courts with a system of county courts in all but twenty-six counties where the municipal court was given countywide jurisdiction. The jurisdiction of the county courts extends to all the territory of the county not subject to municipal court jurisdiction; they have exclusive civil jurisdiction up to \$100 and concurrent civil jurisdiction with the courts of common pleas between \$100 and \$300. They also have criminal jurisdiction in motor vehicle violations, misdemeanors and other cases in which the justice of the peace

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formerly had jurisdiction. County court judges are required to be members of the bar who have practiced law for at least one year. They are compensated by salaries and permitted to practice law in cases not involving their courts.

Oklahoma: A judicial article adopted in 1967 abolished superior, common pleas, county, children's, juvenile and justice of the peace courts and replaced them with a district court system. The district courts are staffed by district, associate and special judges and exercise unlimited original jurisdiction over nearly all justiciable matters.

Oregon: In 1965 justices of the peace in Multnomah County were abolished and replaced with a district court.

Pennsylvania: Legislation enacted in 1970 established community courts which, if adopted by the voters of a judicial district, replace municipal, traffic and justice of the peace courts. Community court judges are salaried and serve ten-year terms.

Tennessee: In 1937 the legislature provided for a general sessions courts for Davidson and Montgomery counties and reduced the judicial power of the justice of the peace court in these two counties to preliminary examinations and ministerial functions. For the next twenty years similar legislation was enacted piecemeal establishing general sessions courts in all but six of Tennessee's ninety-five counties. In 1959 legislation created a uniform system for these general sessions courts served by salaried, full-time, legally trained judges.

Virginia: In 1936 by special legislative enactment all justices of the peace in certain cities and towns and in all counties were replaced by salaried trial justices. Most justices were appointed by judges of circuit courts (the trial court of general jurisdiction), but some continued to be elected. They exercised exclusive civil jurisdiction up to \$200 and concurrent civil jurisdiction with the circuit courts between \$200 and \$1,000. Criminal jurisdiction was limited to violations of ordinances, county, city and town by-laws and most misdemeanors. In 1956 legislation designated all trial justices as municipal or county court judges. All trial justices must be appointed by circuit judges. Civil jurisdiction was raised from \$200 to \$300 and maximum concurrent civil jurisdiction was raised from \$1,000 to \$2,000. Justices were required to be licensed to practice law in the state. Today the jurisdiction of the justice of the peace is limited to preliminary examinations in criminal proceedings.

Washington: In 1961 legislation replaced the justice of the

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peace and other minor courts in King, Pierce and Spokane counties with a justice court, which has a municipal division and over which the supreme court has administrative authority. The legislation also abolished the fee method of judicial compensation. This plan may be extended to all other counties by local option. In 1963 new procedural rules were adopted for civil and criminal cases in courts of limited jurisdiction

Wisconsin: Legislation enacted from 1959 to 1961 created a court reorganization plan establishing the county court as the principal forum for small cases. County court jurisdiction, which formerly had been limited to probate, paternity and juvenile cases, was expanded to include general civil jurisdiction up to \$25,000 and concurrent criminal jurisdiction with the circuit courts (general trial courts). Except in Milwaukee County, where they became divisions of the county court, the municipal, civil and district courts were eliminated. Justice of the peace courts were retained but with civil jurisdiction limited to cases up to \$200 and authority to perform marriages. The system of part-time judicial officers compensated by fees was eliminated. In 1966 a constitutional amendment was adopted removing the judicial power from justice of the peace courts and, in effect, abolishing them.

Wyoming: In 1966 all references to justice of the peace courts was removed from the Wyoming constitution.

Reasons for reform. The primary objections to the justice of the peace system appear to be (1) lack of legal training, (2) the fee system as the basis of compensation and (3) inadequate courtroom facilities and staff.¹⁸

Lack of legal training. Montana and most other states with justice of the peace courts do not require justices to have legal training.¹⁹ Professors Mason and Crowley, authors of a 1967 study of Montana's judicial system, contended that the overwhelming majority of justices of the peace and police judges lack legal training and do not have the requisite knowledge to decide many of the cases presented in their courts.²⁰ This lack of legal training usually places the judge at a disadvantage since Montana county attorneys have law degrees and law enforcement officers

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frequently are knowledgeable in the law of their particular field.²¹ A conclusion reached by Mason and Crowley was:

[S]ociety is much more complex and the business of the courts is much more involved and technical than it was even a half century ago, and this is reflected by the fact that many states today are overhauling their judicial systems. Today it is clear that if justice is to be dispensed expeditiously without the aid of attorneys, it must be by capable judges who are well trained in our system of jurisprudence.²²

The changing nature of the J.P. function in relation to the existing training and education requirements also was emphasized by a commentary on Nebraska's minor courts:

A justice of the peace had a real function in 1866, in 1875 and even in 1920. His function in the earlier years of our state was to resolve disputes between his neighbors, to bring justice close to home in those days before paved highways and motor vehicles. It was not thought necessary then that the justice of the peace have any legal training, so long as he exercised good common sense in determining who was right and who was wrong. But, the job has changed, even though the qualifications have not. Today, the bulk of a justice's workload is traffic cases. He is ruling on violations of the law that did not even exist when the justice court was first created. Yet, he still does not have to have any legal training, or formal education, does not have to own a law book, or have read the law, or even be able to read.²³

One example of "common sense justice" administered by lay judges is the report of an Arkansas justice of the peace who at eighty years of age tried more than 200 cases annually on the strength of his seventh-grade education and a single copy of the Arkansas statutes. In an interview, this judge stated: "I don't ever remember having one who wasn't guilty. If the sheriff picks up a man for violating the law, he's guilty or he wouldn't bring him in here. And anyway I don't get anything out of it if they aren't guilty."²⁴

To compensate for the lack of legal training, justices of the peace were limited in their jurisdiction and the aggrieved party was granted the right to appeal to a higher court where

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the entire case was tried anew (de novo) before a judge with legal training.²⁵ In Montana appeals from justice of the peace and police courts are made to the district court.²⁶ Thus, the caseload burden of district courts is increased unless the complaint is dropped by the county attorney, who may not have time to prosecute minor criminal offenses or by a losing party in a civil suit who cannot afford the appeal.

This division of judicial responsibilities between the district courts and minor courts creates numerous problems:

One is that the right of appeal de novo gives the person charged with a misdemeanor or involved in a minor civil matter the right to have his case heard twice, while the person facing a more serious crime or civil problem involving large sums of money has the right to only one trial. If justice is accomplished by allowing only one trial for serious matters, it appears to be a waste of public funds to allow two trials for the so-called minor troubles.

The right of appeal de novo allows a defendant to avoid a sentence or stall its imposition. If one is not satisfied with his sentence, it's easy for him to appeal the case and after having the whole matter re-tried, if convicted against, to be sentenced by a different judge who will probably render a different sentence. In a sense the right of appeal de novo gives the defendant a veto over the sentence rendered by a lower court judge. As a result some judges structure their sentences to meet the approval of defendants rather than render the sentence which the crime and situation demands.

By appealing, an accused increases his odds of avoiding a conviction. Essential witnesses move away or die, interest in the case lessens or the calendar of the higher court is so clogged with more important matters as to make it difficult to retry the case. This often results in the prosecutor dismissing or reducing the charge rather than going through a second trial.²⁷

Another commentator noted that if qualifications of justices of the peace could be raised so that a competent lawyer could serve independent of a fee system, there is no reason why the

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justice of the peace system could not be maintained in a modified form.²⁸

Fee System. The fee system is one of the most frequently criticized aspects of justice courts. Fees or court costs are the sole basis of compensation for about 85 percent of the justices of the peace in Montana.²⁹

The constitutionality of the fee system has been the subject of debate since the U.S. Supreme Court in Tumey v. Ohio³⁰ declared that a system by which an inferior judge is paid for his services only when he convicts the defendant cannot be considered due process of law "unless the costs usually imposed are so small that they may be properly ignored as within the maxim de minimis non curat lex."³¹ Although the Tumey case involved a system where the judge retained a fee only if he found the defendant guilty, a statement in the court's dictum could be used to attack the constitutionality of the fee method of judicial compensation in general:

Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the state and the accused denied the latter due process of law.³²

In Montana, the compensation of a justice is determined, in most instances, by the number of cases he hears. The number of cases brought before him rests largely on the discretion of law enforcement officers in the county. The argument has been made that when a justice's compensation is almost completely dependent upon peace officers and prosecuting officials, it seems highly improbable that the justice of the peace can "hold the balance nice, clear, and true between the State and the accused" as the Tumey decision suggests.³³

The control of the purse strings exerted by law enforcement officers is illustrated by the responses to questionnaires sent to justices of the peace in 1967 by the Montana Supreme Court:

One justice reported he had no cases whatever in the calendar year 1966, apparently because Highway Patrol officers took violators out of

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his township. Another justice wrote: "[T]he influence exerted over these Courts by the Montana Highway Patrol is not in the best interest of justice and should be stopped." Yet another opined that justices of the peace should be on a salary, and wrote: "It would make it more equal where two justices are elected in one township and stop these County Attorneys and Highway Patrolmen from filing all cases in one Court, which you will note by the newspaper clipping enclosed of the State auditing report of 1967, that the total monies collected in the [other] . . . Court, who is also the court house janitor, far exceed that collected in my Court, which I consider very unfair." Another justice wrote: "[L]aw enforcement at the lower levels has degenerated to a point where it is a pitfall."³⁴

Clearly the fee method of judicial compensation can undermine the independence of thought and action required of judicial officers. That was aptly pointed out by a dissenting opinion in Application of Borchert,³⁵ a 1961 Washington case:

The income of the fee justice of the peace depends directly upon the volume of cases filed. If no cases are filed, he receives nothing. Vice inheres in the system.³⁶

The fee system, although the amount of fees be not dependent in terms upon the result, tends to impair judicial integrity. Police and prosecutors can punish a justice of the peace who discharges defendants whom they wish to convict, by failing to bring cases before him. . . . Judicial independence is as necessary in lower courts as in others. . . .³⁷

The same dissenting opinion further stated:

The primary evil resulting from the fee system is the pressure it exerts on each justice who operates under it to get more business in order to enlarge his income. . . . Most criminal complaints are made by officers exercising police powers. These officers naturally seek convictions, and would be expected to patronize justices who aid them in their efforts rather than those who insist too rigidly upon protecting the rights of the defendants. A sympathetic attitude toward the views of the police is therefore

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quite likely to result in more business and an increase in the justice's income.³⁸

We are confronted, then, with a system in which the income of the unsalaried justice of the peace is utterly [sic] dependent upon the whim and caprice of the arresting officers. . . .The difficulty lies not with the integrity or capability of the past, present or future justices of the peace but with the system which compels men to choose between their own financial advantage and justice. . . .The test is whether this enticement inheres in the system. It does. On the one side, the justice of the peace is tempted to enhance his income by doing the bidding of arresting officers; on the other, he must decide impartially in each case. No more is required to demonstrate a very real likelihood of bias. It is the constitutional right of every person . . .to be tried by justices of the peace as impartial as the law can devise.³⁹

The majority of the court in the Borchert case avoided the argument that fee justice courts are inherently biased and that such a system should be abolished, stating: "Such an argument is properly addressed to the electorate and the legislature. . . . The argument presents a legislative problem, not a judicial one."⁴⁰

Inadequate facilities. Many citizens have their initial contact--sometimes their only contact--with the administration of justice in a J.P. court. If this court creates a bad impression, public esteem and respect for the entire state judicial process may be lessened. Justices of the peace often conduct court in makeshift facilities, creating an inappropriate atmosphere for the dispensing of justice.⁴¹ The Mason-Crowley report indicated that in 1966, courtroom facilities were furnished to less than 30 percent of the justices in Montana.⁴² Proceedings were conducted in a newspaper office, pool hall, railroad depot, store, county jail, city council chambers and private homes.⁴³ One justice who was a full-time auto mechanic reportedly held court without ever emerging from beneath an automobile.⁴⁴

Similar situations are found elsewhere. A report on Nebraska's courts of limited jurisdiction stated:

There should be a place for these justices in our system. But, we should do away with a system that permits an untrained justice to hold court in a service station, or his kitchen, or to allow his

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secretary to rubber stamp his name on orders while he is a patient in a nursing home. . . . [T]o permit [these things] to continue can only destroy respect for law and the judicial system. The average citizen's contact with the law comes only in a minor way, most often with a traffic ticket. If he is not treated fairly and with dignity when he has that contact in one of our courts of limited jurisdiction, he is not likely to respect that court or the higher courts with all of their robes and judicial dignity.⁴⁵

Thwarted Objectives. Although one of the purposes of minor courts is to provide an accessible forum for local redress, Table 6 indicates an irrational distribution of justices of the peace throughout the state. Cascade and Missoula counties, with respective populations of 81,804 and 58,263, have only two justices each, while there are five justices in Mineral County, which has a population of only 2,958. Big Horn and Treasure counties have two justices each; however Big Horn is five times larger in area than Treasure County.

The statistics in the Mason-Crowley study revealed that the "constitutional objective of having a 'poor man's court' in which litigants in actions involving small sums could get efficient and substantial justice is not being effectuated"⁴⁶ in Montana. Justice of the peace courts have become more administrative in nature and less trial-oriented; they are relatively inactive in civil work and their criminal work is limited to "the administrative disposition of misdemeanor offenses of which the overwhelming majority are traffic offenses."⁴⁷ The decline in trial work is shown by the following summary based on 77 percent of the total number of justice of the peace courts in Montana:⁴⁸

TABLE 6

JUSTICES OF THE PEACE AND POLICE JUDGES IN MONTANA, 1971

County	No. of Police Judges (PJs)	No. of Justice of Peace (JPs)	No. of JPs Who Serve As PJs	1970 Pop.	Sq. Mi. Area	Pop. Per Sq. Mi.
Beaverhead	2	3	1	8,187	5,551	1.5
Big Horn	1	2	1	10,057	5,023	2.0
Blaine	2	3	1	6,727	4,275	1.6
Broadwater	1	2	1	2,526	1,193	2.1
Carbon	4	4	1	7,080	2,066	3.4
Carter	1	4	1	1,956	3,313	0.6
Cascade	3	2	0	81,804	2,661	30.7
Chouteau	3	5	2	6,473	3,927	1.6
Custer	1	3	1	12,174	3,756	3.2
Daniels	2	2	1	3,083	1,443	2.1
Dawson	2	3	1	11,269	2,370	4.8
Deer Lodge	1	4	0	15,652	740	21.2
Fallon	2	1	0	4,050	1,633	2.5
Fergus	2	3	2	12,611	4,242	3.0
Flathead	3	4	2	39,460	5,137	7.7
Gallatin	5	4	1	32,505	2,517	12.9
Garfield	1	2	1	1,796	4,455	0.4
Glacier	2	6	0	10,783	2,964	3.6
Golden Valley	0	2	1	931	1,176	0.8
Granite	2	3	1	2,737	1,733	1.6
Hill	1	2	1	17,358	2,927	5.9
Jefferson	1	3	0	5,238	1,652	3.2
Judith Basin	1	3	1	2,667	1,880	1.4
Lake	3	9	1	14,445	1,494	9.7
Lewis & Clark	2	6	0	33,281	3,476	9.6
Liberty	1	2	1	2,359	1,439	1.6
Lincoln	3	6	2	18,063	3,714	4.9
McCone	1	1	1	2,875	2,607	1.1
Madison	4	5	2	5,014	3,528	1.4
Meagher	1	2	1	2,122	2,354	0.9
Mineral	1	5	0	2,958	1,222	2.4
Missoula	1	2	0	58,263	2,612	22.3
Musselshell	2	3	2	3,734	1,887	2.0
Park	1	1	0	11,197	2,626	4.3
Petroleum	1	1	1	675	1,655	0.4
Phillips	2	3	2	5,386	5,213	1.0
Pondera	2	3	2	6,611	1,645	4.0
Powder River	1	2	1	2,862	3,288	0.9
Powell	1	2	0	6,660	2,336	2.9

TABLE 6 (Continued)

JUSTICES OF THE PEACE AND POLICE JUDGES IN MONTANA, 1971

County	No. of Police Judges (PJs)	No. of Justice of Peace (JPs)	No. of JPs Who Serve As PJs	1970 Pop.	Sq. Mi. Area	Pop. Per Sq. Mi.
Prairie	1	2	1	1,752	1,730	1.0
Ravalli	3	3	0	14,409	2,382	6.0
Richland	2	2	1	9,837	2,079	4.7
Roosevelt	4	5	3	10,365	2,385	4.3
Rosebud	1	4	1	6,032	5,037	1.2
Sanders	2	6	3	7,093	2,778	2.6
Sheridan	2	3	2	5,779	1,694	3.4
Silver Bow	2	4	0	41,981	715	58.7
Stillwater	1	2	1	4,632	1,794	2.6
Sweet Grass	1	2	1	2,980	1,840	1.6
Teton	2	3	1	6,116	2,294	2.7
Toole	2	2	1	5,839	1,950	3.0
Treasure	1	2	1	1,069	985	1.1
Valley	3	3	1	11,471	4,974	2.3
Wheatland	0	2	1	2,529	1,420	1.8
Wibaux	1	2	1	1,465	890	1.6
Yellowstone	2	4	1	87,367	2,642	33.1
TOTALS	100	174	57	694,409	145,587	4.8

Sources: Montana League of Cities and Towns, 1971 Directory of Montana Municipal Officials (Helena, 1971); Montana, Highway Patrol, Justices of the Peace/State of Montana (Helena, 1971); U. S. Department of Commerce, Bureau of the Census, 1970 Census of Population; Number of Inhabitants: Montana (Washington: U. S. Government Printing Office, 1970), p. 12.

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1. Civil Work. . . .Of the 141 justices of the peace reporting [questionnaires were sent to 184], 51 showed no civil cases filed in their courts during the calendar year of 1966 . Eighty-nine justices (including all of the above mentioned 51) reported no trials of civil cases during that calendar year. It appears from these figures that over 1/3 of the justice courts handle no civil work at all and 2/3 of them have no trials in civil cases.

The judges reported a total of 4,797 civil case filings. They indicated that, of these, 263 were tried. The total number reported tried is only a little over 5% of the number filed; however, even this small figure does not give a true picture of the situation. Over 75% of all civil cases filed (3,665) were filed in just 11 of the 141 courts. Only 50 cases were tried in those courts for a trial ratio of only 1.5%. This might indicate a much higher ratio of trials in the other 130 courts but the reports leave substantial doubt of this; the actual number of trials may be much lower than the over-all total reported. A major portion of the total number of trials reported outside the 11 largest courts were filed by a few justices who showed that a trial was had in almost every case. Their reports indicate that many of the justices consider a "trial" to be any sort of proceeding beyond the filing of the original complaint, an appearance by the defendant, a contested motion, or anything other than a default judgment. There is every indication that the ratio of cases tried to cases filed is really lower than the statewide figures indicate.

One other significant factor emerged from a study of these reports. The great volume of filings was concentrated in a few townships having a large wage-earning labor force -- principally in the mining, smelting and logging industries. Almost invariably one or more of the reporting courts in municipalities of this character showed an extraordinarily large number of civil cases filed with few or none ever tried. In addition, some small communities with a predominantly laboring population showed a much higher rate of civil filings than that shown by nonindustrial communities

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of similar population. . . .Justice courts in the civil field (where they function at all) appear to be primarily administrative debt collection agencies where garnishment actions are pursued and ended by default judgment. Certainly the reports indicate that there is no great civil trial load in the justice courts of Montana at this time.⁴⁹

2. Criminal Work. . . .Forty-six of the courts reported that they had no criminal trial of any kind. Of the 138 courts which reported some trial work, 27 reported that they tried only traffic offenses. Only a little over half of the courts had both traffic and non-traffic trials in 1966. More than twice as many trials were reported on traffic offenses than on non-traffic offenses (2,790 traffic trials were reported against 1,299 nontraffic trials). Statewide, the justices reported that they tried less than 10% of the traffic cases filed in their courts. Even this figure is undoubtedly higher than the actual number tried due to the manner of reporting. Several judges noted that they included in the category of "cases tried" every case which was not a bond forfeiture - including pleas of guilty, actual trials, and payment of fines in person by the defendant. The figures submitted by a number of other judges who showed that trials were had in almost 100% of the cases indicate that these judges used the same standard to judge what was or was not a "trial." There is little doubt that the trial ratio in Montana justice courts in all criminal cases is considerably less than 15% of all cases filed.

There is some significant difference in the workloads of justices who have their offices at county seats and those who do not. Over half of the judges reporting who resided outside county seats had no trial at all during 1966 (37 of 72), but at least 73 of 84 justices at county seats reported some trial work of one kind or another. The great bulk of reported trials in nontraffic cases was done in courts at county seats, 1,031 trials were held at county seats, and only 268 outside county seats.

These figures would seem to indicate further that the trials in all cases other than traffic offenses

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are centered in courts in the county seat where they can be handled by the county attorney as county prosecutor.⁵⁰

Police Courts

The same criticisms leveled against justices of the peace are applicable to police courts. As Table 6 indicates, fifty-seven of Montana's police judges serve as justices of the peace. Therefore, only forty-three police judges are compensated solely on a salary basis.⁵¹

The qualifications of police judges are as minimal as those of justices of the peace since a J.P. can serve concurrently as a police judge.⁵² Furthermore, the Mason-Crowley study revealed that the work of police courts has become increasingly administrative in nature:

As in the case of justices of the peace the reports showed that the work of the police courts is not principally trial work and the manner of handling and disposing of cases is much the same. The 64 judges who reported [out of a total of 85 police judges in the state at that time] handled 46,026 traffic cases in 1966. 1,778 of these cases were tried--a trial rate of less than 4%. The police judges also reported 7,196 criminal prosecutions for offenses other than traffic violations. The reports show that 1,457 of these cases were tried - a trial ratio of a little over 20%. These figures appear, like the equivalent figures submitted by many justices of the peace, to be an overstatement because many of the judges reported as "trials" any proceeding beyond a mere bond default. Whether or not the entire discrepancy between the 4% trial rate on traffic offenses and the 20% reported rate on other offenses is due to this factor is impossible to state. However, most cities and towns have some procedure for disposition of routine traffic tickets without a personal appearance by the defendant. This is not generally true of the other kinds of misdemeanor violations handled by traffic courts, such as drunkenness and vagrancy where the accused is usually taken into custody and physically held for action by

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the police judge. Whatever the explanation, the combined trial rate for all offenses was only 6%. The work load of these courts, like that of the justice courts, is primarily administrative disposition of traffic offenses, with a somewhat higher load of nontraffic misdemeanors.⁵³

Reform Alternatives for Montana's Minor Courts

If the foregoing analysis of Montana's minor court operations shows a need for reform, the question becomes whether the reform should be made at the constitutional level or the legislative level. Many states have removed the constitutional status of minor courts, delegating the responsibility for reform to the legislature. The New Mexico constitutional provisions abolishing justice of the peace courts stated:

Justices of the peace shall be abolished not later than five years from the effective date of this amendment and may, within this period, be abolished by law, and magistrate courts vested with appropriate jurisdiction. Until so abolished, justices of the peace shall be continued under existing laws.[New Mexico Const. Art. VI, Sec. 31]

However, other states have specified in their constitutions the replacement for minor courts. Oklahoma consolidated its minor court system into district courts by the following constitutional provision:

All Courts in the State of Oklahoma, except those specifically provided for in this Article, are hereby abolished at midnight on the day preceding the effective date of this Article and their jurisdiction, functions, powers and duties are transferred to the respective District Courts, and, until otherwise provided by statute, all non-judicial functions vested in such courts are transferred to the District Courts and Judges thereof. . . .[Oklahoma Const. Art. VII, Sec. 7]

Municipal courts in Oklahoma were left to legislative reform:

Municipal Courts in cities or incorporated towns shall continue in effect and shall be subject to creation, abolition or alteration

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by the Legislature by general laws, but shall be limited in jurisdiction to criminal and traffic proceedings arising out of infractions of the provisions of ordinances of cities and towns or of duly adopted regulations authorized by such ordinances. [Oklahoma Const. Art. VII, Sec. 1]

To improve the administration of justice on the minor court level in Montana, several alternatives are available.

1. Retain justice of the peace and police courts if retained, substantial improvements could be made in the existing system. Minor court judges could be compensated by salary rather than fees; other states such as Delaware and North Carolina have taken this step.⁵⁴ Training in the law or a qualifying examination could be required. Judicial officers in Washington's largest counties must be attorneys; in New York, Mississippi and Iowa, justices are required to complete training courses.⁵⁵ Minor courts could be placed under the supervision of the state court system, as Delaware has done.⁵⁶ Supervision could result in better record-keeping and more uniform methods and procedures on this court level.

An overhaul of the existing minor courts may improve the quality of justice administered; nevertheless, imposing additional qualifications and restrictions on the courts does not solve the problems of overlapping jurisdictions or the uneven distribution of judges.

2. Replace minor courts with another system of courts. This alternative would maintain the three-level court structure in Montana. The ABA model judicial article replaces minor courts with a magistrate court system. (See Appendix E). Magistrate courts are utilized in Kansas, Missouri, New Mexico and South Carolina. These courts generally are staffed by legally trained officers paid on a salary basis; jurisdiction is usually broader than that J.P. courts exercise, particularly in the small claims area. Other states have replaced minor courts with a uniform system of county courts or district courts with municipal courts operating in urban areas. Attempting to institute a system of county courts in Montana may be the least feasible alternative, depending upon the facilities and the staff required to operate them.

3. Consolidate the jurisdiction of minor courts into one general trial court. Consolidation of the justice of the peace and police courts into Montana's district courts would achieve the ideal two-level court structure, but would present problems in the area of personnel to handle the additional

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caseload which would be thrust upon the district courts. Auxiliary judicial officers such as magistrates and commissioners have been utilized by the federal courts and other state systems to supplement the judicial staff of trial courts.

Magistrates

In 1968 a magistrate system for federal district courts replaced a similar commissioner system.⁵⁸ The magistrates, appointed and supervised by federal district court judges,⁵⁹ try minor criminal offenses and serve as committing and examining officers.⁶⁰

Full-time federal magistrates serve eight-year terms and must be members of the bar. If the appointing court finds no lawyer available in a specific location to serve as magistrate, the bar requirement is waived and a part-time magistrate may be appointed to serve a four-year term.⁶¹ Part-time magistrates may engage in other businesses or occupations including the practice of law.⁶² Compensation ranges from a maximum of \$22,500 a year for full-time magistrates to a maximum of \$11,000 a year for part-time magistrates.⁶³ Training programs are conducted by the Federal Judicial Center.⁶⁴

On the state level, Illinois has a consolidated trial court system with magistrates serving full-time.⁶⁵ They are appointed by circuit court judges and must be attorneys unless the circuit has none available.⁶⁶ The constitutional provision which accomplished consolidation states:

The judicial power is vested in a Supreme Court, an Appellate Court and Circuit Courts. [Illinois Const. Art. VI, Sec. 1]

The magistrate system is provided by statute in Illinois.⁶⁷

Other states using a magistrate or commissioner system include Hawaii, Alaska, Idaho, Michigan, Minnesota and Wyoming.⁶⁸ A study of Utah courts recommended magistrates:⁶⁹

[T]he J.P. problem is primarily a rural problem. In view of the inadequacies of the JP system . . . there is no realistic argument supporting retention of the JP system in areas which are primarily urban. In those areas, there is a clear need to replace the JP system with a more adequate "inferior court" system--preferably

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a system which constitutes an integral part of a single unified court system. Any changes in the system will, of course, have to provide for availability of and prompt access to a judicial officer by law enforcement personnel for warrants and bail determinations. These problems, however, can readily be solved either by use of a commissioner system similar to that utilized by the federal courts or by the development of a system of magistrates under judicial supervision.

It is the rural context which creates the problem for changes in the JP system. Many counties do not have sufficient legal business or law trained personnel to justify city courts even at the county seats. Motorists, particularly tourists, either state residents or non-residents, could be subjected to considerable inconvenience if ready access to a method of adjudicating traffic violations were not available. An equally substantial burden would be imposed upon law enforcement personnel if judicial officials were not readily available, particularly in view of the broadened constitutional protections being developed by the United States Supreme Court. However, these legitimate concerns should not prevent modifications of the JP system, if changes in that system are enacted with a proper appreciation of the distance problem inherent in the rural counties.

The fundamental fact of modern life often ignored by those who fear a modification of the JP system is that of modern communications. There is no reason why search or arrest warrants can not be obtained by radio and, if the subject of the warrant doubts its validity, verification could be accomplished in the same way. More expensive, but equally possible, would be a system of magistrates, paid possibly on a scale based on estimates of work load, appointed by the courts and answerable to the courts for their performance in office.

The magistrate system could also fulfill the bail commissioner function to accommodate rapid and convenient handling of traffic and fish and game matters. However, no pressing need for such office exists. Most such matters could be handled by

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means of a summons and acknowledgment system which merely requires the defendant to appear within some reasonable time after the summons is issued at a convenient session of a court established on a county-wide basis. Administrative control over the issuance of summonses by the police or highway patrol could be obtained by a system using multiple copies of each summons, with a requirement that an acknowledgment copy of each summons issued be placed in the mail immediately after its issuance by both the officer and the offender. Administration of these matters could then be handled at the regularly scheduled sessions of the county court nearest the defendant. All of those who would prefer to forfeit bail could do so by mail. And offenders warranting arrest and detention could be taken to one of several court facilities in the county. While some form of after-hours arraignment would be necessary, this problem could easily be solved by the designation of a court employee as a committing magistrate when the judge is unavailable. . . .

The Mason-Crowley study recommended the use of auxiliary judicial officers--commissioners--to exercise the jurisdiction of the district courts in criminal cases not amounting to felonies and to act as a committing and examining court in felony cases.⁷⁰ This approach is patterned after the federal court system. However, the necessity for judicial officers to serve in the area of small civil claims as well as petty criminal offenses is well-recognized. The present minor court system in Montana is not being utilized in the area of small claims, yet there should be a forum for citizens to litigate such cases without the expense of hiring an attorney. Thus, any replacement of minor court officials in Montana could be directed to both the civil and criminal areas.

Opposition to Minor Court Reform

A Court Study Commission in South Dakota supported the continuation of a J.P. system by stating:

The faults and shortcomings of the (JP) system are many. But, as stated by one of South Dakota's Circuit Judges, it is a part of our legal system

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which the average citizen feels unconsciously is part of the "warp and woof" of his life. Any statistical evaluation cannot measure the value of this element. Certainly, where distances are great, and the population is small, availability, in a geographic sense, becomes important. And in urban areas a court of limited jurisdiction can furnish not only an expeditious means of disposing of a multitude of minor matters, but it provides a familiar forum for the settlement of small claims. Thus, despite the many criticisms of this court, the Court Study Commission recognizes the need for a continuance of it in a more closely supervised form.⁷¹

This argument has been countered by the contention that accessibility in a consolidated court can be assured by requiring a consolidated county or magistrates court to travel a circuit, and that there is no reason why a "common man's court" could not be operated as a specialized division of the general trial court.⁷²

There is a natural resistance to any change in the status quo by those who may lose a position in the new order. One commentator noted:

Inferior court officialdom--judges, clerks, constables, and other functionaries--naturally resist abolition of their offices. . . and these particular offices are especially hard to eliminate, for the incumbents are often close to their legislators.⁷³

Another argument generally leveled against the consolidation of lower courts into the trial courts' jurisdiction is the expense involved in providing records of the proceedings and manpower necessary to handle court hearings on such minor matters as traffic violations, breaches of the peace and fish and game violations. The Mason-Crowley study of Montana's judicial system noted that the total compensation to justices of the peace and police judges in 1966 was \$239,674.⁷² and for the same amount of money, at least fifteen legally-trained judges at \$15,000 per year could be hired.⁷⁴ Another observer questioned the magnitude of the expense involved in keeping records of minor hearings when electronic recording equipment could be used.⁷⁵ Furthermore, the elimination of appeals for trials de novo would save the present expense of repeating the original trial from scratch.⁷⁶

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The Advisory Commission on Intergovernmental Relations noted that resistance to a change in lower courts may come from general trial court judges:

Some general trial court judges may not relish the prospect of taking on some of the business handled by the inferior courts, for they prefer the prestige of occupying a high court insulated from the myriad problems of petty offenses.⁷⁷

Reform Attempts in Montana

Since 1945 attempts have been made in Montana either to eliminate the constitutional status of justice of the peace courts or to improve the quality of justice administered at this level.⁷⁸

More recently, an amendment to remove mention of justice of peace courts from the Constitution was rejected by state voters in 1962, but only by a margin of 1,173 votes. In 1971, a bill was defeated in the legislature that would have required new justices of the peace to have a law degree, or to have completed a two-day training session sponsored by the Montana Magistrate Association.⁷⁹

Despite the failures in lower court reform, the consensus of the Citizen's Conference on the Montana Judicial System in 1966 was:

The type and quality of justice presently being provided in these courts could be materially improved by adoption of a unified court system which would provide a district court level of judicial quality for all legal proceedings. This unified court system might be materially implemented by incorporating within it a provision whereby, where needed, district court judges might select persons to act as deputy judges or magistrates to assist the district court in supplying continuous court representation in remote areas of the state.⁸⁰

The justices of the peace themselves recognize the need for improvement in the present system. The president of the Montana Association of Magistrates pointed out that educating the judges would solve many problems:

We want more schools (usually two-day seminars

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conducted by district judges) and we need them. . . I find the critics attitude rather amusing. They refuse to provide the schools and then they turn around and say we don't know anything, so they'll have to throw us out.⁸¹

CENTRALIZED ADMINISTRATION

State court systems are large-scale business operations. National expenditures for judicial activities in fiscal 1968-69 amounted to approximately \$900 million.⁸² An enterprise of this magnitude demands the most output for each dollar. In terms of fair and speedy administration of justice, courts must be properly administered to avoid backlogs and delay. In a 1970 address to the American Bar Association, Chief Justice Warren Burger declared:

The management of busy courts calls for careful planning, and definite systems and organization with supervision by trained administrator-managers. . . . We need them to serve as "traffic managers," in a sense as hospitals have used administrators to relieve doctors and nurses of managerial duties. We are almost a century behind the medical profession in this respect.⁸³

Another member of the U.S. Supreme Court, Justice William Brennan, has advocated application of business management principles to court operations:

No governmental department of any size could operate efficiently without an administrative head. A regiment of officers with no men would not function. A business office could not be imagined in which everyone is manager and no one can tell anyone what to do. Yet this is substantially what we have in the courts--a situation which grew out of the sanctity of the so-called autonomous court.

Now, obviously judges should be independent in rendering decisions. The error crept in when this independence was carried over to administration. In any large institution, whether it be court, government agency, or business firm, someone must run the show on the administrative side. Someone must be

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boss. When a modern court system is established there should be an administrator at the head of the entire organization, as there is in the executive branch. This should be a permanent chief justice of the supreme court. He should be given specific powers of administration--studying docket conditions, shifting judges as needed, appointing administrative judges below, requiring statistical information, and so on. In addition he should have general administration control over the entire structure, as well as superior authority to the administrative judge in the trial court. . . .⁸⁴

Even when supervisory control over lower courts is granted to the supreme court by a state constitution, administrative responsibility is not always achieved. A 1963 South Dakota study indicated that no means to implement the supervisory control granted to South Dakota's supreme court had been devised, and the result was a lack of administrative responsibility at nearly every court level.⁸⁵ The same situation exists in Montana. The Montana Supreme Court is granted "a general supervisory control over all inferior courts" by the Constitution. This power, however, has been exercised only to control the course of litigation in lower courts in specific cases,⁸⁶ to apportion business among district judges in a multi-judge district if they fail to do so themselves⁸⁷ and to compel a district judge to perform his duties.⁸⁸ As the Mason-Crowley report noted:

Neither the constitution nor statutes of the state contemplate integral continuous administrative control or supervision by the supreme court of lower state courts.⁸⁹

Scope of Centralized Administration

The primary objective in centralizing the administration of all courts within a state is to systematize the operations of the judicial system. An administrative office in the judiciary would provide the same services available in most large business organizations: compilation of caseload statistics, preparation of a budget for the entire judicial system, assignment of judges to equalize judicial workloads and to prevent court congestion, supervision of court personnel and facilities, and assistance in the determination of procedures for channeling litigation through the various steps in the judicial process in a prompt and efficient manner.⁹⁰

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Most of these services are not coordinated on a statewide basis in Montana. Fifty-six counties, all municipalities with police courts and the state deal with judicial budgeting. Judicial assignments are handled on an informal basis; if a judge is disqualified or otherwise unable to preside in a case, he contacts another judge to serve in his stead. It is difficult to determine the fiscal expenditures made by the entire judicial system in the state because budgeting operations are decentralized. Furthermore, the amount of variance in caseloads between districts or the possibility of congestion in court calendars cannot be detected without compilation of state statistics.

While crowded dockets and delay in litigation may not be paramount problems in Montana today, these problems can proliferate from inefficient court management and organization. A device which would enable the courts to meet the demands of future judicial business could be a provision for centralized administration.

Vesting Administrative Authority

An important factor in improving a judicial system is proper placement of administrative responsibility. Seventeen states--Alaska, Arizona, Colorado, Delaware, Georgia, Hawaii, Idaho, Illinois, Iowa, Louisiana, Maryland, Michigan, Missouri, New Jersey, Ohio, Oklahoma and Pennsylvania--have constitutional provisions vesting administrative authority in the state's highest court.⁹¹ To aid in the administration of court systems, outside agencies have been employed to work with state supreme courts. Initially judicial conferences or councils were created as advisory bodies; however, these advisory responsibilities have devolved to state court administrators.

State Court Administrators

A definite trend in administration of judicial systems is the employment of professional court administrators. In 1970, thirty-five states provided by constitution or statute for the appointment of full-time, nonjudicial personnel to assist the supreme court or the chief justice in the discharge of administrative supervisory functions.⁹²

Table 7 shows that twenty-one court administrators are appointed by the highest court of the state, nine by the chief justice, three by the judicial conference or council and one each by a judicial study commission and an

TABLE 7
STATE COURT ADMINISTRATIVE OFFICES, 1970

State	Title of Officer	Appointed by	No. of employees		1970 approp
			Prof.	Nonprof.	
Alaska . . .	Administrative Director	Chief Justice	5	14	\$393,027
Arizona . . .	Administrative Director	Supreme Court			
Arkansas . . .	Executive Secretary, Judicial Department	Chief Justice	1	1	34,725
California . . .	Administrative Director	Judicial Council	18	13	624,028
Colorado . . .	State Court Administrator	Supreme Court	10	5	291,827
Connecticut . . .	Executive Secretary, Judicial Department	Chief Court Administrator	10	21	357,400
Hawaii . . .	Administrative Director	Supreme Court	3	7	236,691
Idaho . . .	Administrative Assistant of the Courts	Supreme Court	2	2	41,000
Illinois . . .	Director, Administrative Office	Supreme Court	7	14	379,065
Indiana . . .	Executive Secretary	Judicial Study Commission			
Iowa . . .	Judicial Department Statistician	Supreme Court	1	1	25,250
Kansas . . .	Judicial Administrator	Supreme Court	1	3.5	Part of Supreme Court Budget
Kentucky . . .	Administrative Director	Court of Appeals	—	6	—
Louisiana . . .	Judicial Administrator	Supreme Court	1	3	74,677
Maine . . .	Administrative Assistant	Chief Justice	1	2	31,500
Maryland . . .	Director, Administrative Office of the Courts	Chief Justice	3	4	121,343
Massachusetts . . .	Executive Secy, Supreme Judicial Court	Supreme Judicial Court	1	1	67,970
Michigan . . .	State Court Administrator	Supreme Court	4	7	416,522
Minnesota . . .	Administrative Asst to Supreme Court	Supreme Court	1	1	34,300
Missouri . . .	Executive Secretary, Judicial Conference	Supreme Court			
New Jersey . . .	Administrative Director of Courts	Chief Justice	17	23	544,090(est)
New Mexico . . .	Director, Administrative Office of the Courts	Supreme Court	1	9	108,500
New York . . .	State Administrator for the Courts	Admin Bd of Jud. Conference	9	130	—
North Carolina . . .	Director, Administrative Office of the Courts	Chief Justice	6	37	425,577
Ohio . . .	Administrative Director	Supreme Court	2	2.5	—
Oklahoma . . .	Administrative Director	Supreme Court	2	4	—
Oregon . . .	Administrative Assistant to Chief Justice	Chief Justice	1	1	27,000
Pennsylvania . . .	State Court Administrator	Supreme Court	3	4	400,000
Rhode Island . . .	Court Administrator	Chief Justice	4	3	
Tennessee . . .	Executive Secretary to Supreme Court	Supreme Court	2	4	125,000
Utah . . .	Administrator of District Courts	Supreme Court			
Vermont . . .	Court Administrator	Supreme Court	1	3	47,000
Virginia . . .	Executive Secretary, Supreme Court of Appeals	Supreme Court of Appeals	—	2	37,680
Washington . . .	Administrator for the Courts	Supreme Court			
Wisconsin . . .	Administrative Director	Supreme Court	2	5	84,100

Source: Advisory Commission on Intergovernmental Relations, State-Local Relations in The Criminal Justice System, Report A-38 (Washington: U.S. Government Printing Office, 1971), p. 96.

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administrative board. All but a few serve at the pleasure of the appointing authority.⁹³ Staff size varies from two members in Arkansas, Iowa, Massachusetts, Minnesota, Oregon and Virginia to 139 members in New York. The appropriation for the administrators is not always separable from the appropriation for the supreme court, but where it is separable, it ranges from \$25,250 in Iowa to \$624,028 in California, with a median of approximately \$109,000.⁹⁴

A recent survey of court administrative offices indicated that in sixteen states the administrators were required to be members of the bar, while Alaska, Michigan and New Mexico also required administrative training or experience.⁹⁵ The annual compensation of state court administrators ranges from \$11,000 in New Mexico to \$36,950 in New York; an average salary is approximately \$19,000.⁹⁶

The duties of administrative officers vary, with more emphasis on appellate court operations. Table 8 indicates that the primary function performed for all courts is the collection and compilation of data, followed by the examination and design of statistical systems, formulation of recommendations on court structure, and investigation of complaints about court operations. On the trial court level, larger administrative offices are involved in collecting and compiling statistics, obtaining reports from these courts, and making recommendations to the chief justice or the supreme court regarding the assignment of trial court judges. Activities of administrators lessen in the area of minor courts; the most common activities appear to be requiring reports from these courts, examining their statistics and recommending uniform system; collecting and compiling data, and investigating complaints.

Effect of Unification on Administrative Authority. Of thirty-one state court administrative offices responding to a study by the Advisory Commission on Intergovernmental Relations and National Conference of Court Administrative Officers, sixteen were classified as operating in a unified court system.⁹⁷ Table 9 compares these sixteen offices to the total offices responding and indicates that the administrative offices in a unified system have a greater degree of involvement, particularly on the lower court level. Furthermore, administrative staffs in unified court systems tend to have a larger staff available and higher appropriations than those in nonunified systems, as shown in Table 10.

TABLE 8

ACTIVITIES PERFORMED BY 31 STATE COURT ADMINISTRATIVE OFFICES, 1970

Activities performed	Percentage of States Performing Activities in following Courts:			
	Supreme	General Trial	Limited Jurisd.	Intermed. Appellate ²
A. Evaluating Organization, Practices, Procedures				
1. Examine administrative methods and systems used in offices of clerks, probations officers, etc., make recommendations for improvement.	71%	81%	61%	67%
2. Investigate complaints on court operations.	68	90	71	73
3. Formulate recommendations on structure of court system, organization, functions which should be performed by various courts.	74	81	64	93
4. Assist in preparing recommendations to Governor, Legislature regarding court organization, practices, procedures.	68	74	55	93
B. Statistics and Records				
1. Examine statistical system and make recommendations for uniform systems.	71	90	71	80
2. Design (or contract for design) of statistical systems.	71	84	68	73
3. Collect and compile data on court business transacted.	87	100	71	86
4. Require all necessary reports from the courts on rules, dockets, business dispatched or pending.	77	97	71	80
5. Maintain records of assignment and disposition of matters submitted to supreme court and of opinions and orders.	42	NA	NA	NA
6. Prepare annual report and other reports as directed by the court.	84	NA	NA	NA
C. Dispatch of Judicial Business				
1. Make recommendations to chief justice or supreme court relating to assignment of judges where courts need assistance and carry out direction of chief justice or supreme court as to assignments.	39	81	48	53
2. Report to chief justice or supreme court concerning cases pending which can not be tried because of accumulation of business.	26	52	32	33
3. Assist in preparing assignment calendars of judges, handle printing, distribution thereof.	6	6	10	0
4. Make reports concerning performance of duties by special trial judges.	10	32	13	13
5. Implement standards and policies on hours of court, assignment of term parts, judges and justices, publication of judicial opinions	19	19	19	13
D. Fiscal Procedures				
1. Prepare and submit courts' budget request.	81	68	42	86
2. Maintain accounting and budgetary records for appropriations	74	64	42	67
3. Audit bills.	64	55	39	60
4. Approve requisitions.	61	48	32	47
5. Disburse monies from court appropriation.	61	55	35	53

TABLE 8 (Continued)

Activities performed	Percentage of States Performing Activities in following Courts:			
	Supreme	General Trial	Limited Jurisd.	Intermed. Appellate ²
D. Fiscal Procedures (Cont'd)				
6. Collect statistics on expenditures of State, county, municipal funds for courts and related offices.	48	45	39	33
7. Serve as payroll officer.	61	55	35	53
8. Exercise other assigned fiscal duties.	42	26	16	33
E. Supervision of Non-Judicial Personnel				
1. Responsible for supervising administration of offices of clerks and other court clerical and administrative personnel.	52	42	39	33
2. Fix compensation of clerks, deputies, stenographers, other employees whose compensation is not fixed by law.	42	35	23	47
3. Exercise other duties with respect to personnel practices.	58	35	29	60
4. Appoint clerical assistants.	35	19	19	20
5. Supervise assignment of court reporters.	23	32	19	7
F. Equipment and Accommodations				
1. In charge of arrangements for accommodations for use of courts and clerical personnel.	48	23	23	27
2. Exercise duties with respect to care and maintenance of law libraries.	35	23	16	27
G. Secretariat				
1. Act as executive secretary of:				
Judicial council—	45%			
Judicial conference—	26			
Judicial qualifications commission—	39			
Other—	42			

¹ The 31 States are: Alaska, Arkansas, California, Colorado, Connecticut, Hawaii, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Utah, Vermont, Virginia, Idaho, Maryland, New Jersey, and Wisconsin.

² These are percentages of the 15 States that have intermediate appellate courts.

Source: Advisory Commission on Intergovernmental Relations, State-Local Relations in The Criminal Justice System, Report A-38 (Washington: U. S. Government Printing Office, 1971), pp. 97-98.

TABLE 9

PERCENTAGE OF 31 STATE COURT ADMINISTRATIVE OFFICES ENGAGED
IN SPECIFIED ACTIVITIES AT VARIOUS COURT LEVELS, 1970

Category of activity	Supreme Court	Intermediate Appellate	General Trial	Limited Jurisdiction
Evaluating organization, practices, and procedures .	70%	83%	83%	60%
Statistics and records	72	80	93	70
Dispatch of judicial business	20	22	38	24
Fiscal procedures	62	54	52	35
Supervision of nonjudicial personnel	42	33	33	28
Equipment and accommodations	42	27	23	20

Of the 31 Administrative Offices Cited Above, Percentage of
Those Offices in 16 Unified State Court Systems Engaged
in Specified Activities at Various Court Levels

Category of activity	Supreme Court	Intermediate Appellate	General Trial	Limited Jurisdiction
Evaluating organization, practices, and procedures .	88%	85%	91%	82%
Statistics and records	82	85	98	91
Dispatch of judicial business	23	24	43	38
Fiscal procedures	74	61	71	58
Supervision of nonjudicial personnel	52	38	53	47
Equipment and accommodations	60	25	37	34

Source: Advisory Commission on Intergovernmental Relations,
State-Local Relations in The Criminal Justice System, Report
A-38 (Washington: U.S. Government Printing Office, 1971),
pp. 188-189.

TABLE 10

COMPARISON OF STAFFING AND 1970 APPROPRIATION FOR STATE COURT
ADMINISTRATIVE OFFICES OF STATES WITH UNIFIED AND NON-UNIFIED
JUDICIAL SYSTEMS

Unified States			Non-Unified States		
	No. of Employees* per 100,000 Population **	1970 Appropri. Per Cap. **		No. of Employees* per 100,000 Population **	1970 Appropri. Per Cap. **
Alaska	8.51	\$1.39	Arkansas . . . . .	.15	\$.02
Colorado	1.19	.14	California . . . . .	.25	.03
Connecticut	1.37	.12	Iowa . . . . .	.11	.01
Hawaii	1.64	.30	Kansas . . . . .	.24	NA
Idaho . . . . .	.83	.06	Kentucky . . . . .	.19	NA
Illinois . . . . .	.25	.03	Louisiana . . . . .	.13	.02
Michigan . . . . .	.17	.05	Maine . . . . .	.41	.03
New Jersey . . . . .	.94	.08	Maryland . . . . .	.27	.03
New Mexico	1.11	.11	Massachusetts . . . . .	.05	.01
New York . . . . .	.81	NA	Minnesota . . . . .	.08	.01
North Carolina . . . . .	.94	.08	Oregon . . . . .	.15	.01
Ohio . . . . .	.06	NA	Rhode Island	1.21	NA
Oklahoma . . . . .	.31	NA	Tennessee . . . . .	.20	.03
Pennsylvania . . . . .	.08	.03	Virginia . . . . .	.04	.01
Vermont	1.14	.11	Weighted Average . . . . .	.19	.02
Wisconsin . . . . .	.21	.02	Unweighted Average . . . . .	.25	.02
Weighted Average . . . . .	.60	.06			
Unweighted Average	1.22	.19			

* One professional employee counted as equal to two nonprofessionals.

** Population estimate from U.S. Department of Commerce, Bureau of the Census, *Estimates of the Population of States, July 1, 1968 and 1969* (Advance report), Series P-25, No. 430, August 29, 1969.

NA — Figures not available from questionnaire responses.

Source: Advisory Commission on Intergovernmental Relations, *State-Local Relations in The Criminal Justice System*, Report A-38 (Washington: U. S. Government Printing Office, 1971), p. 190.

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Federal Court Administration. On the federal level, Congress established the Administrative Office of the United States Courts in 1948.⁹⁸ It is supervised by a director and deputy director who are appointed by the federal supreme court and receive annual compensations of \$40,000 and \$36,000 respectively.⁹⁹ The director is the administrative officer of the federal courts and serves under the supervision and direction of the Judicial Conference of the United States.¹⁰⁰ His duties, enumerated in federal legislation, include:¹⁰¹

(1) Supervise all administrative matters relating to the offices of clerks and other clerical and administrative personnel of the courts;

(2) Examine the state of the dockets of the courts; secure information as to the courts' need of assistance; prepare and transmit quarterly to the chief judges of the circuits, statistical data and reports as to the business of the courts;

(3) Submit to the annual meeting of the Judicial Conference of the United States, at least two weeks prior thereto, a report of the activities of the Administrative Office and the state of the business of the courts. . .

.

(5) Fix the compensation of clerks of court, deputies, librarians, criers, messengers, law clerks, secretaries, stenographers, clerical assistants, and other employees of the courts whose compensation is not otherwise fixed by law;

(6) Determine and pay necessary office expenses of courts, judges, and those court officials whose expenses are by law allowable, and the lawful fees of United States magistrates;

(7) Regulate and pay annuities to widows and surviving dependent children of judges and necessary travel and subsistence expenses incurred by judges, court officers and employees. . .

(8) Disburse, directly or through the several United States marshals, moneys appropriated for the maintenance and operation of the courts;

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(9) Purchase, exchange, transfer, distribute, and assign the custody of law books, equipment and supplies needed for the maintenance and operation of the courts and the Administrative Office and the offices of United States magistrates;

(10) Audit vouchers and accounts of the courts and their clerical and administrative personnel;

(11) Provide accommodations for the courts and their clerical and administrative personnel;

(12) Perform such other duties as may be assigned to him by the Supreme Court or the Judicial Conference of the United States.

In addition, the director is required to submit to the Bureau of the Budget annual estimates of the expenditures and appropriations necessary for maintenance and operation of the federal judicial system, subject to the approval of the judicial conference. ¹⁰²

Judicial Councils and Conferences

Judicial councils and conferences were initiated as advisory bodies to the courts. Judicial conferences are composed of judges from all levels within the court system. In 1948, the Chief Justice of the United States Supreme Court was empowered by Congress to convene an annual conference of federal judges.¹⁰³ The conference's function is to survey the condition of court business, make recommendations for the assignment of judges, and carry on a continuous study of rules of practice and procedure.¹⁰⁴ Operating within each circuit of the federal judicial system is a judicial council which is responsible for making all necessary orders for the effective and expeditious administration of the courts within its circuit subject to the policy decision established by the judicial conference.¹⁰⁵ However, these councils vary greatly in the extent to which they use their power and it has been suggested that many policy recommendations made by the federal judicial conference remain unimplemented.¹⁰⁶

State judicial councils were first adopted in the 1920s.¹⁰⁷ Membership usually includes legislators, judges, members of the bar and other interested citizens. All but one state, South Dakota, had a judicial conference or council in operation in 1968.¹⁰⁸ Three states now have constitutionally created judicial councils;¹⁰⁹ in most states, these councils and conferences are established by statutes. Others are set up

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by court orders or informal agreements.¹¹⁰ In Montana the chief justice of the supreme court has discretionary power to call a conference of judges.¹¹¹

Table 11 shows the membership, powers and duties of judicial councils and conferences created by statute. Their functions are similar to the federal judicial conference discussed previously. In several cases, these bodies appoint court administrators. In eleven states the court administrator serves as the secretariat of the council or conference (see Table 7). In a few states the judicial council may serve as a judicial nominating or removal body; for example, Alaska's Constitution delegates to the judicial council the responsibility to certify judicial incapacity to the governor or to recommend early retirement of a judge to the supreme court.¹¹²

However, the need for judicial councils and conferences in court administration is decreasing. The Advisory Commission on Intergovernmental Relations concluded in a recent report:

In general, it seems that the importance of the judicial council as an institution for improving court administration has declined as the office of full-time State court administrator has taken hold.¹¹³

Rule-Making Power

An adjunct to administrative authority in a unified court system is the authority to make rules of practice and procedure. Rules of practice or court administration deal with the internal operations of the judiciary--hours of holding court, length of briefs submitted by attorneys and method of record-keeping. Procedural rules, on the other hand, deal with the mechanics of litigation--how a lawsuit is started, how the issues are formulated, how the trial is conducted and how an appeal is taken. In determining whether a constitutional grant of rule-making authority should be made, the area of procedural rules offers the most controversy.

In general, law has two aspects: substance and procedure. The judiciary and legislature are involved in creating substantive law. If no statutory provision governs a particular matter in litigation, the decision of the court forms a body of law called "case law." Thus, an appellate court decision not only provides a solution to a particular case but also establishes precedent to be used in future cases. However,

TABLE 11

TYPE OF MEMBERSHIP, POWERS AND DUTIES OF STATUTORILY
ESTABLISHED STATE JUDICIAL COUNCILS AND CONFERENCES, 1968

State	Name of Unit	Membership includes:				Powers and Duties												
		Judges	Lawyers	Legislators	Others	Study Admn of Courts	Investigate Criticisms	Recommnd Ct Imprvmts	Adopt Rules of Procedure	Recommnd Rules Changes	Appt Court Adminstrtr	Assign Judges	Collect Statistics	Require Reports of Courts	Prepare Ct Budgets	Nominate Judicial Candidates to Governor	Recommnd Removals, Discipline, Retirement	
Alabama	Jud. Conference	x	x			x	x	x		x								
Alaska	Jud. Council	x	x		x	x		x	x									x ¹
California	Jud. Council	x	x	x		x		x	x		x	x		x				x ²
Conn.	Jud. Conference	x			x	x				x				x				
Conn.	Jud. Council	x	x		x	x		x		x				x				
Del.	Council on Adm. of Justice	x	x	x	x	x	x	x	x				x					
Florida	Jud. Adm. Comm.	x			x	x					x				x			x ³
Florida	Jud. Council	x	x		x	x	x	x		x			x					
Georgia	Jud. Council	x	x	x	x	x	x						x					x ⁴
Hawaii	Jud. Council	x	x		x	x												
Idaho	Jud. Council	x	x		x	x		x								x	x	x ⁵
Illinois	Jud. Adv. Council		x	x		x		x										
Illinois	Jud. Conference	x				x												
Iowa	Jud. Study Comm.		x	x	x	x	x	x					x					
Kansas	Jud. Council	x	x	x		x	x	x		x								
Kentucky	Jud. Council	x	x	x		x	x	x		x								
Maine	Jud. Council	x	x		x	x		x		x								
Mass.	Jud. Council	x	x			x		x		x								
Mich.	Jud. Conference	x				x		x		x								
Minn.	Jud. Council	x	x		x	x		x		x								
Mo.	Jud. Conference	x				x		x		x				x				
N. H.	Jud. Council	x	x		x	x	x	x		x			x					
N. Y.	Jud. Conference	x				x	x	x	x ⁶	x								x ⁷
N. D.	Jud. Council	x	x		x	x		x		x			x	x				x ⁸
Ohio	Jud. Council	x	x	x	x	x		x		x								
Ore.	Jud. Conference	x				x		x										
Ore.	Jud. Council	x	x	x	x	x	x	x		x								x ⁹
R. I.	Jud. Council		x			x		x										
S. C.	Jud. Council	x	x	x	x	x	x	x		x			x					
Tenn.	Jud. Council	x	x	x	x	x	x	x					x	x				
Texas	Adv. Jud. Coun.	x	x	x	x	x	x	x						x				
Vt.	Jud. Council	x	x		x	x		x										
Va.	Jud. Council	x	x			x		x										
Wash.	Jud. Council	x	x	x	x	x	x	x		x								
W. Va.	Jud. Council	x	x		x	x		x					x					
Wisc.	Jud. Council	x	x	x	x	x	x	x		x			x					

¹ California. Adopts rules for administration. Appoints court administrator. ² Connecticut. Insures effective administration of judicial department. ³ Florida. Maintains central State office for administrative services for supreme, district, and circuit courts, states attorney, public defenders, court reporters. ⁴ Georgia. Makes suggestions regarding admission to the bar and conduct of lawyers. ⁵ Idaho. Such other duties as assigned by law. ⁶ New York. Civil practice only. ⁷ New York. Advises and assists administrative board. ⁸ North Dakota. Appoints executive secretary. ⁹ Oregon. May employ executive secretary and research personnel.

Source: Advisory Commission on Intergovernmental Relations, State-Local Relations in The Criminal Justice System, Report A-38 (Washington: U.S. Government Printing Office, 1971), p. 277.

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case law can be supplanted by legislation.

In the area of procedure, the functions of the court and the legislature are not as clearly defined. Until the nineteenth century, both procedural and administrative rules were made by judges on a case-by-case basis.¹¹⁴ Soon the procedural system had become so complex that the substantive rights of the litigant were forgotten in the maze of procedural technicalities. Public dissatisfaction led to procedural reform; in 1848 a uniform procedural code was enacted by the New York legislature. Thereafter the New York model, the Field Code, was copied over most of the United States and legislative enactments became the norm in establishing procedure.¹¹⁵ These codes, however, became extremely detailed after amendment piled on amendment. It became evident that another method of devising procedural rules was necessary. In 1934 Congress granted full rule-making power to the federal supreme court which led to the adoption of the Federal Rules of Civil Procedure.¹¹⁶ Enactment of the federal rules spurred procedural reform in many states by either enacting an entire new code or establishing a system for gradual revision on a piecemeal basis.¹¹⁷ Thus rule-making by the court subject to legislative approval became an established method of determining rules of procedure.

As for rules of internal administration, traditionally each court was free to determine its own operational rules which resulted in a hodge-podge of court rules throughout a state. The recent tendency is to restrict local authority to make such rules and vest the highest state court with the power to make general rules of administration applicable to all courts.¹¹⁸

Rule-Making in Montana

There is no grant of rule-making authority in the Montana Constitution. Traditionally, the power has been exercised by the Montana legislature, but in 1963 the legislature granted the supreme court power to make rules of civil procedure.¹¹⁹ In 1967 the court's rule-making authority was extended to criminal procedure;¹²⁰ this grant of authority expired in 1969 and has not been renewed.¹²¹ As for rules of court administration, the district courts and the supreme court are granted power to determine their own rules. However, the district court rules cannot conflict with those of the supreme court¹²² and the legislature has reserved the right to modify or repeal supreme court rules.¹²³

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Where the Power is Vested

There is little debate over placement of the administrative rule-making authority. Most authorities advocating modernization of court administration believe this power should be given to the supreme court to help it systematize the judicial branch. In states like Montana where each district court is free to determine its own rules, vesting the authority in the supreme court alone would result in a change to uniform court practices throughout the state. Administrative rule-making power could be construed as inherent in any constitutional provision which vests administrative responsibility for the court system in the supreme court; thus, an additional grant of administrative rule-making power to the court might be surplus verbage.

The area of procedural rule-making offers special problems. There are opposing schools of thought on where procedural rule-making authority should be vested. Some argue that this function is an exclusive power of the judicial branch. On the other hand, it is argued that such rule-making is essentially legislative in nature and that without enabling legislation the judiciary is powerless to act. A view supported by many courts is that the judiciary has inherent power to adopt procedural reforms, provided that they do not conflict with existing legislation.¹²⁴ The New Mexico Supreme Court has held that a constitutional provision granting superintending control over inferior courts to the supreme court includes the authority to issue rules of procedure.¹²⁵ The judiciary vs. legislature debate stems from the nature of procedural rules themselves. In many instances procedure may affect substantive rights. According to proponents of legislative rule-making, substantive enactments by the judiciary are infringements on the legislative function. This is illustrated by the limitation placed on the Montana Supreme Court when the legislature empowered it to establish rules of civil procedure: "Such rules shall not abridge, enlarge, or modify the substantive rights of any litigant . . ."¹²⁶

A 1970 American Judicature Society study showed that approximately one-third of the state constitutions delegate procedural rule-making authority either to the legislature or the supreme court.¹²⁷ California is an exception; its constitution grants such authority to the judicial council.¹²⁸ Through constitutional or statutory provision, the supreme court of eighteen states make procedural rules according to the AJS study:

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Arizona, Colorado, Florida, Hawaii, Idaho, Indiana, Kentucky (civil rules only), Maine, Michigan, Nevada (civil rules only), New Jersey, New Mexico, North Dakota, Utah, Virginia, Washington, West Virginia and Wyoming. In nearly all these states, supreme court rules supersede procedural legislation.

In nine additional states, according to the survey, the supreme court may initiate rules subject to some kind of legislative action. Thus, court-initiated rules are subject to legislative veto in seven states: Alaska, Connecticut, Iowa, Maryland, Minnesota, Missouri and Texas. In Georgia these rules must be affirmatively approved by the legislature before they are effective; in North Carolina they are subject to legislative repeal.

In sixteen states, the legislature makes procedural rules: Alabama, Arkansas, California (prior to 1966), Illinois, Kansas, Louisiana, Massachusetts, Nebraska, New Hampshire, New York, Ohio, Oklahoma, Oregon, South Carolina, Tennessee and Vermont. In about half of those states, the supreme court exercises supervisory authority supplementary to the statutory rules; in the other half, there is little or no court supervision.

In three states--Delaware, Mississippi and Rhode Island--supervisory rule-making power is centralized in neither the court nor the legislature. And in South Dakota and Wisconsin, the constitution and status are unclear as to where the authority rests. However, Wisconsin rules usually are made by the Supreme Court subject to legislative modification.

The ABA model judicial article (Appendix E) vests rule-making power exclusively in the supreme court; the NML article (Appendix D) vests it in the supreme court subject to change by two-thirds vote of the legislature.

An ACIR study indicated that of eighteen unified court systems, nine vest rule-making power exclusively in the supreme court, four grant it to the court subject to legislative approval or veto, and five give it to the legislature exclusively.¹²⁹ Furthermore, eighteen states by constitution or statute grant the supreme court assistance in rule-making by judicial councils or conferences; four of the unified states are among the eighteen.¹³⁰

Procedural Rule-Making by the Judiciary: Pro and Con

Arguments supporting procedural rule-making by the judiciary include:¹³¹

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1. The judiciary is more aware than legislators of the deficiencies in procedural system and is better equipped to make needed reform. Rigidity of procedural statutes can result in injustice; courts are bound by statute and cannot suspend or modify them to meet situations unforeseen when the laws were enacted. Judicial rule-making makes use of expert knowledge, results in interpretation of rules by those who make them, provides a more flexible procedure because of the speed of amendment and insures more uniformity.

2. Because the public places the responsibility for the efficient administration of justice on the courts and not the legislature, the courts should have authority commensurate with this responsibility. Rule-making power is a necessary instrument for administrative control of the judicial system.

3. Legislatures generally are removed from the operations of courts and are subject to political pressures. Legislative sessions occur only at yearly intervals or even less frequently and are crowded with other problems. Since procedural reform is not a matter which attracts great public interest, legislators may not be as concerned with this area. Because of these conditions, legislative rule-making tends to produce inflexible procedure and subsequent haphazard tinkering resulting in a detailed, complex, cumbersome machinery.

On the other hand, opponents of judicial rule-making list the following arguments:¹³²

1. Courts may use judicial rule-making power to affect substantive interests because substance and procedure are inextricably interwoven. However, this has not been the experience in many states because the courts have tended to be quite conservative in determining what constitutes procedure.

2. Courts fail to respond readily to the public point of view. They are unaccustomed to public hearings and other techniques by which a legislative committee enables interested parties to participate in drafting legislation.

3. Judges also are not qualified to make policy determinations because of their removal from public involvement.

The Convention has two alternatives. Procedural and administrative rule-making authority could be expressly delegated to the supreme court by the constitution. This would grant the court independence to establish rules without legislative action. Provision could be made to subject these rules to legislative repeal or approval which would limit the supreme court's power. On the other hand, constitutional silence

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could be maintained on this issue, leaving the court to establish rules piecemeal whenever the legislature grants it authority to proceed.

Court Financing

Full state assumption of court expenses seems to be a logical concomitant of a unified judicial system. One commentator noted that unification of the courts had failed in New York primarily because there was no unified judicial budget; three-fourths of court expenses were met by localities, not the state. He noted the relationship between efforts to centralize administration of the judicial system and the method of financing:

Those who control the purse can affect administration, and when so many local bodies are involved in court financing, effective central administration is not possible. Since some localities refuse to appropriate what the courts request, salaries vary, and it follows that administrators are denied the tools of a uniform job classification system and uniform work standards. Court staffs are inadequateTransferability of judges and other court personnel to meet unusually heavy burdens is greatly inhibited because some communities object to having people whose salaries they pay serve elsewhere. . . .¹³³

Other observers of judicial systems make the case for state financing as follows:

A state constitutional provision for a unified court system administered by the chief justice of the supreme court permits the judges to control the system of justice. But when the courts must go hat in hand to various local departments of government for the wherewithal to support their needs, the judgment of the financier may be substituted for that of the judge. Conflicts between courts and branches of local government respecting personnel often arise.¹³⁴

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State-Local Sharing

In Montana, the state finances the salaries of supreme court and district court judges and the operational expenses of the supreme court. Counties bear the costs of district court operations and justice of the peace courts. Municipalities finance salaries of police judges. According to a federal census study, the state bears only 29 percent of state-local court expenditures (see Table 12).

In 1968-69, only four states--Connecticut, Hawaii, Rhode Island and Vermont--paid virtually all costs of courts. Three states--Arizona, California and Ohio--picked up less than 15 percent of state-local court costs. Table 12 indicates that fourteen states shared 20 percent or less of state-local expenditures; nineteen shared between 21 and 40 percent; eleven shared 41 to 80 percent, and six accounted for more than 80 percent of the costs. In addition, Colorado in 1970 assumed 100 percent state financing of court expenditures.

A 1969 survey by the Institute of Judicial Administration showed the basic characteristics of state-local fiscal responsibility for courts (see Table 13):¹³⁵

--All but one of the states financed the entire cost of the highest court; in Virginia there was some local sharing.

--Seventeen of the twenty states with intermediate appellate courts also financed their entire cost. In Kentucky, New York and Ohio, there was some local contribution.

--State-local sharing varied among four categories of expenditures in trial courts: (1) judicial salaries were entirely state financed in twenty-one of the states; they were state-locally financed in seventeen, and locally financed in one state. (2) non-judicial salaries were entirely state-financed in twenty states; state-locally financed in fourteen, and locally financed in five. (3) travel expenses were totally state-financed in twenty-one states; state-locally financed in thirteen, and completely locally financed in five. (4) miscellaneous expenses were entirely state-financed in nineteen states; state-locally financed in twelve, and completely locally financed in eight states.

--In the lower courts, state governments supplied total fiscal support in six and shared expense with local units in ten. In at least twenty-two states, local government provided full financing.

TABLE 12

STATE-LOCAL SHARING OF COURT EXPENDITURES, 1968-1969^a

0-20%	21-40%	41-60%	61-80%	81-100%
Arizona (12)	Alabama (23)	Arkansas (47)	Delaware (68)	Alaska (93)
California (13)	Illinois (33)	Idaho (57)	Kentucky (72)	Connecticut (99)
Colorado (17) ^b	Iowa (24)	Maine (56)		Hawaii (99)
Florida (18)	Kansas (29)	New Hampshire (51)		North Carolina (91)
Georgia (17)	Louisiana (35)	New Mexico (47)		Rhode Island (99)
Indiana (19)	Maryland (40)	Oklahoma (44)		Vermont (100)
Michigan (17)	Massachusetts (22)	Utah (57)		
Nevada (17)	Minnesota (21)	Virginia (47)		
New York (20)	Mississippi (27)	West Virginia (42)		
Ohio (13)	Missouri (34)			
Pennsylvania (16)	Montana (29)			
South Carolina (18)	Nebraska (40)			
Texas (19)	New Jersey (34)			
Washington (17)	North Dakota (25)			
	Oregon (27)			
	South Dakota (25)			
	Tennessee (26)			
	Wisconsin (31)			
	Wyoming (36)			
14 States	19 States	9 States	2 States	6 States

^aNumbers in parentheses indicate state percent of State-local court expenditures.

^bColorado assumed full State financing of its court system in 1970.

Source: Advisory Commission on Intergovernmental Relations, State-Local Relations in The Criminal Justice System, Report A-38 (Washington: U.S. Government Printing Office, 1971), p. 108.

TABLE 13

STATE (S) AND LOCAL (L) SHARING OF COURT EXPENSES, 1969

	Highest Court	Intermediate Appellate Courts ¹	Trial Courts of General Jurisdiction				Lower Courts	Judicial Retirement	Judicial Council	Judicial Conference	State Court Administrators	Local Trial Court Administrators	Construction of Court Buildings	Maintenance of Court Buildings
			Judicial Salaries	Non-Judicial Salaries	Travel Expenses	Other Expenses								
Alabama	S	S	S	S	S	S	S	S	S	S	S	S	S	
Alaska	S		S	S	S	S	S	S	S	S	S	S	S	
Arizona		S									S			
Arkansas	S		S	S	S	S	L	S			S		L	L
California		S	SL	L	L	L	SL	S	S		S	L	SL	S
Colorado ⁴	S							SL		S	S	L	SL	S
Connecticut		S	S	S	S	S	L	S	S		S		S	S
Delawara	S		SL	SL	SL	SL	S	S	S	S		L	SL	S
Florida	S	S	S	S	S	S	S	S	S				S	S
Georgia	S	S	L	L	L	L	L	S	S				S	S
Hawaii	S		S	S	S	S	S	S			S	S	S	S
Ideho	S		S	S	S	L	L		S	S	S		SL	S
Illinois	S	S							S	S	S			
Indiana		S					L	S		S	S		L	S
Iowa	S						L	SL	S		S		L	L
Kansas	S		SL	SL	S	L	L	S	S	S	S		L	L
Kentucky	S	SL						S	S	S	S		L	S
Louisiana	S	S	SL	SL	SL	SL	SL	SL	S	S	S			L
Maine			SL	SL	SL	SL	SL	S	S				L	L
Maryland	S	S	SL	L	L	L	L	SL	S	S	S	L	L	L
Massachusatts	S		SL	SL	SL	SL	L	SL	S	S	S	S	L	L
Michigan	S	S	SL	SL	SL	SL	L	S		S	S	L	SL	S
Minnesota	S		SL	SL	SL	SL	L		S		S	L	L	L
Mississippi	S		SL	SL	SL	SL	SL			S			L	L
Missouri	S	S	S	S	S	S			S					
Montana			S	S	S	S	L	S		S				S
Nabraska	S		SL	SL	SL	L	L	S	2	2			L	L
Nevada	S							S					S	
New Hampshire	S		S	S	S	S	L	S	S		S		SL	S
New Jersey	S	S					SL	SL		S	S		L	S
New Mexico		S	SL	SL	SL	SL	SL			S	S			S
New York	S	SL	SL	SL	SL	SL	SL	SL		S	S		L ³	L ³
North Carolina	S	S	S	S	S	S	S	S	S		S		L	L
North Dakota	S		S	S	S	S		L					L	L
Ohio	S	SL	SL	SL	SL	SL	L	SL			S	L	SL	S
Oklahoma	S		S	S	S	S	S	SL		S	S		L	L
Oregon	S		S	L	L	L	SL	S	S	S	S	L	SL	S
Pannsylvania	S										S			
Rhode Island	S		S	S	S	S	SL		S	S				S
South Carolina	S						L						S	
South Dakota	S		S	S	S	S	L	S		S			L	S
Tennessee		S	S	S	S	S	L	S	S	S	S		SL	S
Texas	S	S												
Utah			S	S	S	S	L							
Vermont	S		S	S	S	S	S	S	S		S		SL	S
Virginia	SL		S	S	S	S	SL		S	S	S		L	L
Washington	S		SL	L	L	L	L	S		S	S	L	L	L
West Virginia	S		SL	SL	SL	SL	L	SL					L	L
Wisconsin	S		SL	SL	SL	SL	L	S			S			
Wyoming	S		S	S	S	S		S		S			SL	S

¹ Twenty States have intermediate appellate courts.² Bar Association.³ Except court of appeals.⁴ Colorado assumed full state financing of its court system in 1970.

Source: Advisory Commission on Intergovernmental Relations, State-Local Relations in The Criminal Justice System, Report A-38 (Washington: U.S. Government Printing Office, 1971), p. 110.

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With respect to other items of common expenditure, the IJA survey indicated:

--Judicial retirement systems were entirely supported by state funds in twenty-five states; by state-local sharing in eight states, and by local funds entirely in one.

--At least twenty-one judicial councils and twenty-six conferences were wholly state-supported; in Nebraska each of these bodies was financed by the bar association.

--Of the thirty-five having state court administrators, funds in all thirty-two reporting states came entirely from the state government.

--Seven states paid the full cost to construct court buildings; there was state-local sharing in eleven instances, and complete local funding in seventeen. In New York construction was financed entirely by local funds except for the highest court.

--Maintenance of court buildings was a state funding responsibility in twenty-two states and a local responsibility in the remaining fifteen. In New York, maintenance was financed entirely from local funds, except for the highest court.

The IJA study also sought data on the authority for determining state court budgets. Of the forty-six states that answered, thirty-one reported that their executive budget review agency was authorized to revise judicial budget requests before transmittal to the legislature; fifteen were not. In the great majority of cases, the legislature treated the judicial budget like all other budgets, with full freedom to raise or lower budget requests. The governor was reported to have an item veto over the judicial budget in twenty-nine of the forty-six states.¹³⁶

Overall, the IJA survey indicated that in almost every responding state, the per capita local judicial expense exceeded the per capita state judicial expense, and often was two or three times as much.¹³⁷

Trend toward state financing. Since 1961 Illinois has provided for state payment of the salary of all judges, a large part of which previously had been borne by counties or cities. The legislature provided for state assumption of a part of the salaries of other court personnel. Of the \$8 million additional cost to the state, \$6.5 million represented direct savings to the counties and municipalities.¹³⁸

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In 1966 the Committee on Court Study of the Idaho Legislative Council recommended that all functions of the court system, with the exception of physical facilities, be funded by the state.¹³⁹ In 1962 New York made state aid available to counties as an incentive to their making certain judgeships full-time positions.¹⁴⁰ In 1968 a subcommittee for the study of the Nevada court structure recommended to the Nevada Legislative Commission "that the administration of justice be recognized as a legitimate state expense and paid entirely from the state treasury."¹⁴¹ A 1970 report by the California Council on Intergovernmental Relations recommended that the state's fiscal role should be expanded and more reliance placed on user fees or fines for violations as a source of court finances.¹⁴²

The judiciary article of the National Municipal League's Model State Constitution provides for state financing of its unified court system. However, it permits the legislature to provide by law for political subdivisions to reimburse the state for appropriate portions of such cost (see Appendix D). The NML explains its position in this way:

For improved management made possible by a unified judicial system, the state is to pay for the costs, thus doing away with the widespread practice of having separate local courts maintained and paid for locally. Since burdens may be greater in some parts of the state than in others, and in view of the fact that local sharing of costs may be part of a state's financial structure, the Model allows the legislature to provide for reimbursement to the state by political subdivisions of portions of the cost.¹⁴³

The American Bar Association's model state judicial article makes no provision for overall financing, but provides that the state legislature is to set salaries of judges and magistrates and provide pensions for them (see Appendix E).

Among eighteen states classified as having a unified judiciary by the Advisory Council on Intergovernmental Relations, Alaska, Connecticut, Hawaii, North Carolina and Vermont have full or practically full state financing.¹⁴⁴

Arguments For and Against State Assumption of Court Expenditures

Arguments for state assumption of court costs include:¹⁴⁵

1. Even where a fragmented system exists, the state government

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has a fundamental responsibility for seeing to it that all state and local courts administer justice fairly, consistently and effectively. That holds true even for local courts that may be exclusively concerned with trying violations of local ordinances, which are, in effect, an extension of state criminal laws because the state would have to provide for comparable local regulations if such ordinances did not exist. All judicial personnel directly or indirectly are part of a state system, no matter how disjointed it may be, and this fact argues strongly for full state financing.

2. Variations in local levels of financing produce wide disparities in the performance of courts. That makes it nearly impossible for the state to discharge its responsibility for assuring statewide consistency of court operations. The only defensible way for the state to secure a consistent level of court performance is to assume the total financing for this function.

3. The logical result of effective state assumption of overall responsibility for the state-local judiciary is a unified, simplified system with the supreme court or chief justice responsible for seeing that the system operates properly. The powers vested in the highest court or its chief justice for administration of the state judicial system has little significance if local governments have to be relied on to provide the money for the trial courts.

Arguments against state assumption of courts costs include:¹⁴⁶

1. Such action would reduce, if not eliminate, local responsiveness in the general trial and lower courts. A high degree of responsiveness to local needs, however, is not justifiable if it means uneven and inequitable application of the law between jurisdictions. Furthermore, local responsiveness is assured if judges continue to be selected locally.

2. Local governments that derive a "surplus" above and beyond their judiciary costs from fines and fees (mainly traffic fines) object to surrendering this fiscal advantage. In response it may be argued that the operation of any court as a revenue-raising device should not be condoned. The violations for which the fines are assessed are, after all, violations of state law or--when ordinances are involved--of the extension of the state law within the city or county.

In Montana, state assumption of all judicial expenditures would be a step in unifying its court system. Fees from clerks of district courts and salaried justices of the peace

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that offset judicial expenditures in the counties¹⁴⁷ could be directed to the state treasury. However, the fiscal effect of state financing of the entire judicial system is difficult to determine without a cost analysis of present judicial expenditures on the county and state level. If statewide financing is desired, perhaps the solution proposed by the National Municipal League would be the best alternative in Montana (see Appendix D).

Other Court Organization Considerations

Intermediate Appellate Courts

Intermediate appellate courts are established in twenty states (see Table 3). Mason and Crowley concluded in their study of Montana's judicial system that there was no present need for an intermediate appellate court;¹⁴⁸ however, some states have provided in their constitutions for the creation of these courts should the need arise. Oklahoma's judicial article vests judicial power in "such intermediate appellate courts as may be provided by statute."¹⁴⁹ In Oregon's Constitution judicial power is vested in "one supreme court and such other courts as may from time to time be created by law."¹⁵⁰

Increase in appellate case loads also can be met by allowing the supreme court to sit in divisions. Another solution for an increase in either trial or appellate work is flexible constitutional provisions which allow the number of judges to be increased or the court to be supplemented by outside sources.

Additional Manpower

The present composition of the supreme court in Montana is fixed by the Constitution at five members. Court membership throughout the United States ranges from three to nine (see Table 3). The Convention may wish to consider whether the maximum composition of the supreme court should be raised to seven or nine, allowing the legislature to add members should the court's caseload increase to such an extent that it could not be handled by the present membership.

Another source of appellate manpower is the commissioners system. In Minnesota, North Dakota and South Dakota, retired judges may serve as commissioners to the supreme court.¹⁵¹ In Indiana, Kansas, Kentucky, Michigan, Missouri and Ohio,

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prior judicial office is not a pre-requisite to the post.¹⁵² The duties of commissioners are determined by the supreme court in most states. Usually these officers are assigned cases, hear oral argument and prepare opinions for adoption and rejection by the court.¹⁵³ In Ohio, where commissioners sit as a group, the decision of a majority of the commission is treated as a court decision.¹⁵⁴ Terms of office may be fixed by law or may be subject to the pleasure of the court. Usually retired judges who are appointed court commissioners are paid only the normal retirement allowance.¹⁵⁵ In Indiana, Michigan and Ohio where attorneys may serve as commissioners, annual compensation ranges from \$14,000 to \$26,000.¹⁵⁶

In 1903 and 1920 commissioners were appointed in Montana to alleviate an overburdened supreme court calendar.¹⁵⁷ Thus, it would not be necessary to incorporate this office into the constitution; legislation or supreme court rule could provide for the post when necessary.

Judges pro tempore serve as a source of judicial manpower on the trial level. Article VII, Section 36 of the Montana Constitution provides for these offices:

A civil action in the district court may be tried by a judge pro tempore, who must be a member of the bar of the state, agreed upon in writing by the parties litigant, or their attorneys of record, approved by the court, and sworn to try the cause; and in such case any order, judgment or decree, made or rendered therein by such judge pro tempore, shall have the same force and effect as if made or rendered by the court with the regular judge presiding.

Whether this provision has been utilized by trial courts in Montana is unknown. One argument for retention of this section is to supplement trial courts should a boom of civil litigation occur in the next century. One commentator notes the advantages of pro-tem judges:

A successful "temporary" expedient has been the appointment of pro-tem judges by the courts. Where there is statutory or constitutional authority the appointment of special judges for the relief of the docket of a particular court has had beneficial results, especially where the problem is an inherited backlog. It has the advantage of decreasing the long-range costs of the operation of the courts where the problem

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is one that is not necessarily continuing. It provides a flexible, efficient method of providing judicial manpower in emergencies.

When coupled with the right of the highest court to temporarily assign judges from counties not having a full time workload to counties with a serious backlog many of the normal problems presented by court congestion can be met. . . .¹⁵⁸

Jurisdiction, Judgeships and Judicial Districts

The Convention may wish to consider whether the elaboration of jurisdiction should be shortened or omitted from the judicial article. The enumeration of jurisdictional powers of the supreme, district and justice of the peace courts constitutes a great part of the present judicial article; more recent state constitutions, such as those of Alaska and Hawaii, leave the jurisdiction of the courts to legislative definition.¹⁵⁹ In Montana most of the jurisdictional language of the Constitution is repeated verbatim in statutory form.¹⁶⁰

The present judicial article enumerates eight judicial districts and empowers the legislature to

divide the state, or any part thereof, into new districts; provided, that each be formed of compact territory and be bounded by county lines, but no changes in the number or boundaries of districts shall work a removal of any judge from the office during the term for which he has been elected or appointed [Montana Const. Art. VIII, Sec. 14].

The legislature also may increase or decrease the number of district judgeships as long as there is at least one judge per district.

The Mason-Crowley report indicated a wide variance of case loads among the eighteen judicial districts in Montana. In 1966 the case load per judge ranged from 1,427 in the eighth judicial district to 317 in the fourteenth.¹⁶¹ Although the authors noted that case load does not always reflect work load because the area of some districts requires more travel than others, they concluded that the present districting system is inefficient.¹⁶²

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The solution, however, is not to rigidify judicial districts and judgeships by enumerating them in the constitution. Responsibility for definition of districts and the number of judges therein could be left to the legislature or it could be delegated to the supreme court if the court has rule-making authority. A proponent of the latter alternative argues:

Quick response to changing judicial needs is again facilitated by the supreme court's authority to determine the geographic unit assigned to a particular district court. Judicial districts need not necessarily follow county lines or some other political boundary which may have little or no relevance to caseloads. Through judicial re-districting by the supreme court, the system can be adopted to keep pace with population shifts, changing concentrations of industrial and commercial activity and other factors which affect judicial workloads.¹⁶³

The ABA model judicial article allows the supreme court to fix the amount of districts and judges to serve in each (see Appendix E). The NML judicial article, however, grants primary authority over these matters to the legislature (see Appendix D).

Miscellaneous Provisions

There are various provisions in the present judicial article which might readily be left to legislation, primarily sections 15, 25, 26, 27 and 28 (see Appendix A). These sections deal with matters of process, uniform laws, forms of actions and other subjects that could be provided by legislation or court rules.

CHAPTER III

NOTES

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84. Ohio, Legislative Service Commission, Problems of Judicial Administration (Columbus, 1965), p. 7. Cited hereafter as Ohio Commission, Problems of Judicial Administration.
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91. Alaska Const. Art. IV, Sec. 16; Arizona Const. Art. VI, Sec. 3; Colorado Const. Art. VI, Sec. 5; Delaware Const. Art. IV, Sec. 13; Georgia Const. Art. VI, Sec. 2-3701; Hawaii Const. Art. V, Sec. 5; Idaho Const. Art. V, Sec. 2; Illinois Const. Art. VI, Sec. 2; Iowa Const. Art. V, Sec. 4; Louisiana Const. Art. VII, Sec. 12; Maryland Const. Art. IV, Sec. 18A; Michigan Const. Art. VI, Sec. 3; Missouri Const. Art. V, Sec. 4; New Jersey Const. Art. V, Sec. 6; Ohio Const. Art. VI, Sec. 5; Oklahoma Const. Art. VII, Sec. 6; Pennsylvania Const. Art. V, Sec. 10.
92. ACIR, State-Local Relations, pp. 95, 187; American Judicature Society, Court Administrators, Their Functions, Qualifications and Salaries, Report No. 17 including 1969 Supplement (Chicago, 1966). Cited hereafter as AJS, Court Administrators.
93. Ibid.
94. Ibid.
95. Ibid.
96. AJS, Court Administrators, p. 2 of Supplement. The AJS survey reported the following salaries:

Alaska	\$23,000	Minnesota	\$21,500
Arizona	12,500	Missouri	6,800
Arkansas	18,000	New Jersey	27,000
California	30,000	New Mexico	11,000
Colorado	20,000	New York	36,950
Connecticut	14,740 to	North Carolina	22,500
	18,100	Ohio	17,710
Hawaii	15,800	Oklahoma	17,500
Idaho	13,500	Oregon	13,800
Illinois	25,000	Puerto Rico	16,000
Indiana	12,000	Rhode Island	12,090 to
Iowa	15,500		13,910
Kansas	14,000	Tennessee	20,000
Kentucky	17,000	Vermont	16,000
Louisiana	20,000	Virginia	18,000
Maryland	23,750	Washington	15,000
Massachusetts	22,275	Wisconsin up to	20,000
Michigan	25,776	United States	27,000

AVERAGE SALARY: \$18,904

MEDIAN SALARY: \$21,875

97. ACIR, State-Local Relations, pp. 188-189.
98. United States Codes, Title 28, Ch. 41.

99. Ibid., Secs. 601, 603.
100. Ibid., Sec. 604 (a).
101. Ibid.
102. Ibid., Sec. 605.
103. Ibid., Sec. 331.
104. Ibid.
105. Ibid., Sec. 332.
106. Sidney Schulman, Toward Judicial Reform in Pennsylvania (Sayre, Pa.: Murrelle Printing Co., 1962), p. 186.
107. CSG, Court Administrative Officers, p. 33.
108. ACIR, State-Local Relations, p. 100.
109. Alaska Const. Art. IV, Secs. 8, 9; California Const. Art. VI, Sec. 6; Indiana Const. Art. VII, Sec. 20 (called commissioners).
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111. See Revised Codes of Montana, 1947, Sec. 93-305.
112. Alaska Const. Art. IV, Sec. 10.
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114. Institute of Judicial Administration, Survey of the Judicial System of Maryland (New York, 1967), p. 51; Massachusetts, Legislative Research Council, Rule-Making Power of the Supreme Judicial Court, Senate No. 911 (Boston, 1968), pp. 11-12. Cited hereafter as Massachusetts, Rule-Making.
115. Ohio Commission, Problems of Judicial Administration, pp. 49-50; Institute of Judicial Administration, Survey of the Judicial System of Maryland (New York, 1967), p. 52. Cited hereafter as IJA, Maryland's Judicial System.
116. 28 United States Codes, Sec. 2072.
117. Massachusetts, Rule-Making, pp. 7-8; Ohio Commission, Problems of Judicial Administration, p. 50.
118. IJA, Maryland's Judicial System, p. 53.
119. Revised Codes of Montana, 1947, Sec. 93-2801-1.

120. Ibid., Title 95, Ch. 28.
121. Ibid., Sec. 95-2805.
122. Ibid., Secs. 93-227, 2801-4.
123. Ibid., Sec. 93-2801-8.
124. Massachusetts, Rule-Making, p. 7; American Judicature Society, The Judicial Rule-Making Power in State Court Systems, Report No. 13 (Chicago, 1970), Cited hereafter as AJS, Judicial Rule-Making Power.
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126. Revised Codes of Montana, 1947, Sec. 93-2801-1.
127. AJS, Judicial Rule-Making Power.
128. California Const. Art. VI, Sec. 6.
129. ACIR, State-Local Relations, p. 191.
130. Ibid.
131. Ohio Commission, Problems of Judicial Administration, p. 57; Massachusetts, Rule-Making, pp. 9-10; Joiner, The Michigan Constitution and the Judiciary, pp. 17-18.
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136. Ibid., p. 111.
137. Ibid.
138. Ibid., p. 206.
139. Ibid.

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142. ACIR, State-Local Relations, p. 207.
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160. Revised Codes of Montana, 1947, Secs. 93-213 to 215, 317 to 319, 408 to 410.

161. Mason-Crowley, "Blueprint," pp. 3-4.
162. Ibid.
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CHAPTER IV

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Paradoxically the true measure of any success that we may have had in reaching our goal of a government of law and not of men inescapably rests in large part on the personal qualifications of the men whom we select as judges.¹

Competent judges are essential elements of an effective judicial system. Without an able judge, a court will not dispense justice fairly and efficiently. How to select judicial officers and keep them on the bench and how to remove those who falter in their duties will be primary considerations in revising the judicial article. Since the beginning of the century, debate has flourished over what method is best suited to select a competent judiciary. The primary issue is retention of the elective system vs. adoption of an appointive system. Policy considerations such as electorate control, judicial independence and political patronage will play a large role in resolving the selection quandary.

With so much emphasis placed on choosing a method of judicial selection, often too little attention is given to factors inextricably bound up in the selection process. Length of tenure, adequate compensation and mandatory retirement relate to attracting competent attorneys to judicial positions. Qualifications of judges define the type of person sought for judicial office. Judicial removal and discipline counterbalance the selection process by providing means of assuring that competent judicial administration will be maintained after judges have been selected. Although some of these factors are statutory in nature, recognition of the interwoven relationship of these subjects is necessary to place judicial selection in proper perspective.

JUDICIAL SELECTION

Throughout the history of Western civilizations, the keeping of the peace and the administration of private justice among individuals have been attributes of sovereign power. The repository of sovereign power was usually the ruler or king who initially dispensed judgment himself.² But as the affairs of state became more complex, rulers soon realized that they alone could not effectively administer justice; it was then that the problem

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of judicial selection arose. Moses chose able men from his own acquaintance; King Harmhab of Egypt searched throughout his kingdom for judges "perfect in speech, excellent in character, skilled in penetrating the innermost thoughts of men, and acquainted with the procedure of the palace and the laws of the court."³ Some judges of the English kings' courts were chosen not only for their ability and integrity but also for their willingness to carry out the policy of the Crown.⁴

Unlike countries where the sovereign power was vested in an individual, judicial selection in America, a society where sovereignty resides in the people, posed more difficult problems. Dissatisfaction with colonial judges who were dependent on the king was evident in the Declaration of Independence which stated: "He [George III] has made judges dependent on his will alone, for the tenure of their offices, and the amount of payment of their salaries."⁵ In several of the new states, after independence, the governor merely succeeded the king as individual representative of the people and head of the government and likewise was given the power to appoint judges. However, all of the original states indicated a determination to abolish one-man control of the judiciary by imposing safeguards on this power of appointment. One method was providing that appointment should be subject to approval of a group of people: in Pennsylvania and Delaware, it was the legislature; in Massachusetts, Maryland and New Hampshire it was the governor's council, and in New York there was a special "Council of Appointment" consisting of the governor and certain members of the legislature.⁶ In Connecticut, Rhode Island, New Jersey, Virginia, North Carolina and Georgia, selection of judges by an individual was completely repulsed and the legislature was empowered to appoint judges.⁷ The Federal Constitution, created a few years later, gave the power to appoint judges to the President with the advice and consent of the senate.⁸ Chief Justice Vanderbilt of the New Jersey Supreme Court said of this period:

Thus in the postrevolutionary period in America we find that judges generally were selected by the executive or the legislature to serve in most instances during good behavior. Such a system was in accord with the philosophy prevailing in other civilized countries that the selection of impartial, honest judges learned in the law must be entrusted to a person or group capable of making an intelligent choice and that because of the professional qualifications demanded for judicial office the electorate

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as a whole cannot be expected to make such a choice intelligently any more than it could be expected for instance, to select a surgeon general.⁹

For almost seventy-five years this system prevailed; however, the winds of change were evident as early as 1793 when Georgia became the first state to adopt the principle of popular election of judges.¹⁰

Many factors contributed to the growing demand for popular control of the judiciary. First, the U.S. Supreme Court announced in Marbury v. Madison (1803)¹¹ that the Court had power to adjudge the constitutionality of legislation. Such unprecedented judicial control over the legislature generated a controversy about the dire consequences of unchecked judicial power and led to an attempt by Congress to impeach several justices of the Court.¹² Thomas Jefferson, who before he was President had advocated appointment of judges to serve during good behavior, became convinced after the Marbury decision that the growing power of the judiciary was inconsistent with democratic principles and suggested that popular election of judges might be desirable.¹³

Second, the early American judges were called upon to play a more creative role in the law than their British counterparts. English common-law precedents were not always adaptable to colonial problems and there was little American common law on which to rely. New Jersey and Kentucky, in fact, had passed statutes prohibiting the application of common-law authorities.¹⁴ The courts then were compelled to make interstitial law, which some regarded as an usurpation of the legislative function.

Third, following the American Revolution, lawyers as a professional group were frequently under attack. Many eminent attorneys had been loyalist or left the country prior to the Revolution. Following the war there was much debt collection and foreclosing of mortgages; public distress with the legal profession often led to open revolt against the courts and lawyers, such as Sharp's Rebellion in Massachusetts in 1777.¹⁵

The advent of Jacksonian Democracy advocating control of government by the common man climaxed the argument for popular control of the judiciary. In Jackson's first inaugural address, he espoused a philosophy based on the premise that all men were created equal and then "proceeded to the corollary that they (judges) were as fungible in public office as potatoes."¹⁶

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New York's decision in 1846 to adopt the elective method ushered in the era of elected judges throughout the country. Most of the existing states followed New York's example within a short period and each new state that entered the Union thereafter incorporated the elective of judges into its constitution.¹⁷

1848 - - Illinois, Wisconsin
1850 - - California, Kentucky
1851 - - Indiana, Ohio, Virginia
1852 - - Louisiana
1855 - - Kansas
1857 - - Iowa, Minnesota, Oregon
1863 - - West Virginia
1864 - - Arkansas, Maryland, Nevada
1865 - - Missouri
1866 - - Texas
1867 - - Alabama, Nebraska
1870 - - Tennessee
1873 - - Pennsylvania
1876 - - Colorado, Connecticut, North Carolina
1880 - - New Jersey
1886 - - Florida
1889 - - Idaho, Montana, North Dakota, South Dakota,
Washington, Wyoming
1895 - - Utah
1898 - - Georgia
1905 - - Michigan, Vermont
1907 - - Oklahoma
1912 - - Arizona, New Mexico

Not all states joined the movement. Maine, Delaware, Massachusetts, Rhode Island, South Carolina and New Hampshire did not adopt the elective method.¹⁸ Some states which had chosen election of judges returned to the appointive method. The public became aware of the judicial favoritism of judges controlled by party leaders, such as Boss Tweed in New York. As one surveyor of the judicial scene noted in 1917:

Popular elections throw the choice into the hands of political parties, that is to say, of knots of wire-pullers inclined to use every office as a means of rewarding political services, and garrisoning with grateful partisans posts which may conceivably become accomplices in election frauds, tools in the hands of unscrupulous bosses. Injunctions granted by them were moves in the party game.¹⁹

In an attempt to remove political control in judicial elections, many states instituted non-partisan elections. For some, however,

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the elective process in its entirety was an anathema and the call for a new approach to judicial selection was issued. The embryo of merit selection began taking form in the 1930s and was implemented full-scale in Missouri in 1940.

Today there are five main methods of selecting appellate and major trial court judges used by the states: partisan election, non-partisan election, appointment by the legislature, appointment by the executive and the merit plan. The latter also is known as the Missouri plan, the ABA plan or the appointive-elective plan.

Partisan elections are used in seventeen states:²⁰ Alabama (all but trial judges in largest county), Arkansas, Florida, Georgia, Indiana, Kansas (all but supreme court judges), Kentucky, Louisiana, Mississippi, New Mexico, New York, North Carolina, Pennsylvania, Tennessee, Texas and West Virginia. In Illinois initial selection is by partisan election; subsequent retention is through non-competitive elections.

Non-partisan elections are employed in fourteen states:²¹ Arizona, Michigan, Minnesota, Montana, Nevada, North Dakota, Ohio, Oregon, South Dakota, Washington, Wisconsin and Wyoming. Such elections are used for trial judges in California and for court of appeals, district and associate district judges in Oklahoma.

Appointment by the executive is used for the federal judiciary and in Puerto Rico and nine states:²² California (appellate judges), Delaware, Hawaii, Maine, Massachusetts, New Hampshire, New Jersey and Rhode Island (superior, family and district court judges). Initial appointments in Maryland are made by the governor but judges so appointed must stand for election on a non-partisan ballot in the following year.

Five states use appointment by the legislature:²³ Rhode Island (only supreme court justices), Vermont, Virginia, South Carolina and Connecticut.

The merit selection plan has been adopted in nine states:²⁴ Colorado, Missouri, Alaska, Iowa, Kansas, (supreme court justices only), Nebraska, Utah, Oklahoma (supreme court justices and court of criminal appeals judges), and Idaho (supreme court and district court judges).

Popular election of judges has been the basis of judicial selection in Montana since statehood. The Constitution of 1889

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directs that supreme court justices, district court judges and justices of the peace shall be elected but is silent on the means by which the elections are to be conducted.²⁵ Thus the first legislative session was able to provide for partisan judicial election.²⁶ As early as 1917, attempts were made to institute non-partisan elections, but this was not achieved for district and supreme court judges until 1935.²⁷ Justices and police judges still are elected on a partisan basis.²⁸

It is something of a misnomer, however, to label Montana's method of selecting supreme court and district court judges as "elective." Article VIII, Section 34 provides that vacancies in these judicial positions are to be filled by gubernatorial appointment. Interim appointments in fact have filled more judicial posts than election: of the five supreme court justices presently serving, four were initially appointed to office; of the twenty-eight district court judges, at least three-fourths of them were originally appointed to office.²⁹ Most of these men have been successfully re-elected, supporting the political adage that it is difficult to unseat an incumbent; thus, the original selection of most of Montana's appellate and trial court judges is not by the people but by the governor.

Elective System

Although the popular election of judges has been described as one of the most distinctive contributions the United States has made to world political theory of judicial systems³⁰ and is utilized by more than half of the states today, it has also borne the brunt of more criticism than any other method of judicial selection. But supporters of the system vociferously point out that no system of judicial selection is immune from complaints.

Advantages of Partisan Election

Arguments for retention of the election of judges include the following:

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1. Under a democratic form of government, the people must be given a direct voice in selecting all important officials, including those of the judicial branch. Popular elections at periodic intervals prevent the judiciary from imposing political, social and economic policies which are contrary to the fundamental aims of the people.³¹

2. Election assures selection of judges representative of various ethnic, religious and racial groups of the community.³²

3. This method has produced a qualified, impartial and effective judiciary; there is no evidence of the superiority of judges selected under other systems. Although the appointive system used by the federal government has produced an outstanding judiciary, factors other than the method of selection account for the high quality of the judges.³³

4. Politics never can be entirely eliminated from selection of any government officer. Under the appointive system, those who appoint--presidents and governors--are generally leaders of their own political parties. Nominating commissions and bar associations all are subject to their own kinds of political pressures.³⁴

5. It is important to support party government even in the judicial branch because in the long run, political parties produce better candidates. Any appointive system weakens party government.³⁵

6. The partisan system is best designed to select judges who deal most effectively and sympathetically with everyday problems of ordinary people.³⁶

7. The election of judges insures that the judiciary is an independent branch of our government in that a judge need not look to the executive or legislative branches for appointment and confirmation.³⁷

8. The partisan-elections method should not be disparaged until related problems that influence the quality of judicial administration, such as salaries, retirement benefits and physical facilities, have been improved.³⁸

Disadvantages of Partisan Election

The major criticism of the elective system of judicial selection, be it partisan or non-partisan, is that voter knowledge of candidates and their qualifications is insufficient to form a basis for a rational choice. Few voters are aware of the qualifications needed for judicial office because such qualifications rarely are discussed in campaigns. Impartial appraisals of judicial performance generally are not available to the average voter.³⁹ The elective system arose when the population was small enough that candidates were widely known and the people were more likely to be aware of their qualifications.

Furthermore, statistics show that only a small proportion of voters are responsible for the election of judges. In Los Angeles during a 1962 contested judicial election for three judgeships, only 50 percent of those people who cast ballots voted for the judgeships. Because not all registered voters voted, it was estimated that only 30 percent of the electorate participated in the selection of the judges.⁴⁰ Most who do vote for a judicial candidate do so on the basis of party affiliation or a popular and well-known name. In New York City, a study conducted ten days after the 1954 general election showed that of those polled, only 55 percent had voted for any judicial candidate, and, 42 percent of the voters could not remember the name of the judge for whom they voted.⁴¹

Other criticisms of the partisan election include:

1. The elective system involves essentially a choice of judges by political party officials who are primarily concerned with political factors such as the candidate's support within the local political organization, his prior service for the party and his political charisma.⁴² Thus, many lawyers who would make competent judges are not considered for office because they have not been members of a predominant political party or have not devoted years to political service.⁴³ A recent study showed that of the eighty Cook County circuit or associate circuit judges elected in Chicago, seventy-four were members of regular party organizations.⁴⁴ Most voters merely ratify nominations made in party caucuses so if one party dominates the state, their candidates are assured election.⁴⁵

2. There is nothing in the experience with judicial elections to demonstrate that judges more responsive to the public have been elected or that the quality of the bench has been improved. If able judges have been elected it is fortuitous and in spite of the system.⁴⁶ In Montana and most other states using the elective method of judicial selection, interim gubernatorial appointments rather than elections have put many judges on the bench.

3. Election campaigning is time-consuming and expensive. If a judge seeks re-election, he must take time from his judicial duties at the taxpayers' expense. If a candidate is a practicing attorney, he must either devote less time to campaigning or allow his practice to fall behind.⁴⁷

4. The public is not aware of judicial performance so the elective method does not insure removal of judges who are incompetent. Most judges are defeated in an election not because of poor judicial performance but because their party, as a whole, did badly at the polls.⁴⁸

5. People should have a direct voice in selecting legislators and executives who are policy-makers, but not judges. A judge should be the antithesis of a policy-maker; these men are sworn not to allow influence to affect them or to give preference to one policy over another.⁴⁹

6. The elective system engenders a loss of public confidence in the judicial system as a whole. Campaigns require funds and it is easy to give the impression that contributions for a campaign have strings attached. Even after election a judge must keep up his political connections in order to be re-elected and may refrain from taking action that could offend party leaders upon whom his renomination depends.⁵⁰ The Canon of Judicial Ethics prohibits judges from engaging generally in partisan political activities, except in their own campaigns⁵¹ and from accepting any gifts or financial contributions from lawyers practicing before them.⁵² This does not prohibit financial contributions to a committee supporting the election of a judge; however, to the public this fine distinction does not remove the suggestion that the judge will be beholden to those who helped to elect him.

Variations

To avoid some of the undesirable effects of partisan elections, some states have adopted variations of the elective system. In

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1962 Illinois adopted a procedure termed "merit retention." Judges of appellate and trial courts of general jurisdiction, who are initially elected to office on a partisan ballot, may be retained in office after expiration of their regular terms by a non-competitive election. This plan provides that the name of the incumbent judge is to be placed on a special ballot, without opponents or party organization, to determine whether he should be retained in office for another term. This method has been urged as one that would prevent loss of good judges who fail to be re-nominated or re-elected for reasons not involving the quality of their performance in office, and it removes the judiciary from the pressures of politics. However, it has been criticized, for making it difficult or impossible to remove judges who are competent or have mediocre records unless they have clearly engaged in improper conduct.⁵³

As mentioned previously, fourteen states including Montana have adopted the non-partisan elective system which adherents proclaim eliminates the evils identified with partisan elections without depriving the public of its right to select judicial officers.⁵⁴ Nevertheless, the system has its share of criticism. Opponents claim that it fails to provide any method of screening applicants before they appear on the ballot; thus, candidates who would never be nominated by a party could be elected to political office by such irrelevant factors as a large campaign fund, a pleasing television image, or a preferential place on the ballot.⁵⁵ Furthermore, non-partisan elections deprive a judicial candidate of his party's financial support; thus, he is required to use his own resources or depend upon contributions from "friends," which may affect his impartiality just as much as those judges who receive financial support from party coffers.

Many of the arguments against the partisan system apply also to the non-partisan plan. Time spent away from judicial duties during a campaign year is not reduced. It is estimated that in Montana an incumbent supreme court justice spends nine months of an election year campaigning for office.⁵⁶ Voters' apathy toward judicial candidates in partisan elections is heightened by the non-partisan system. In Montana this system appears to explain reduction in the percentage of votes cast for judges. Prior to the adoption of the non-partisan ballot the Chief Justice race in various years polled 91 to 94 percent of the votes cast for the governor; this decreased⁵⁷ to 77 per cent seventeen years after initiation of the plan. As one analyst concluded: "Sometimes party labels are better than no labels at all."⁵⁸

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Executive Appointment System

In Delaware, Hawaii, New Jersey, Rhode Island, Puerto Rico and the federal judiciary, appointment by the executive is subject to Senate confirmation, while in Maine, Massachusetts and New Hampshire the appointee must be confirmed by the Executive Council.⁵⁹ California's appellate judges are appointed by the governor with the approval of a commission on judicial appointments.⁶⁰ Thus all jurisdictions using this system have placed a control upon the executive's appointive power. In reality, however, nearly every state gives its governor full rein to appoint whomever he chooses to the bench. This occurs through constitutional provisions permitting the governor to fill interim vacancies in judicial offices by appointment without confirmation by another body. In ten years between 1948 and 1957, more than 56 percent of the justices of courts of last resort in thirty-six so-called "elective" states went to the bench by appointment.⁶¹ Thus, executive appointment is responsible for more judicial selection nationwide than any other system. Even in "elective" states the people have tolerated the appointive system far more than they realize.

Advantages of Executive Appointment

Proponents of this method of judicial selection point out that it was followed universally in all states for seventy years after the signing of the Declaration of Independence; that the abuses of judicial appointment which resulted in election of judges do not exist today, and that the elective system is contrary to the professionalism demanded of a modern judiciary.⁶²

Most proponents of the appointive system maintain that selection by a major executive office is more conducive to attaining a qualified, capable judiciary than the elective method whereby candidates are chosen more for political appeal than merit. Two principal reasons are given for the claimed superiority of appointed judges:

1. An individual rather than a group is clearly responsible for the quality of appointed judges. The governor's success in office and his hopes for re-election may depend, in part, upon voters' satisfaction with the judges he has appointed; this responsibility to the public will temper his appointments.

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Provision for a public legislative confirmation hearing at which opponents to the appointment may be heard acts as a substantial check since the executive will want to avoid embarrassment and the legislature will be reluctant to approve an unsatisfactory choice. In the elective system, the responsibility for the quality of the judiciary is diffused among the electorate.⁶³

2. The executive can develop the staff and resources to seek out capable lawyers for judicial office who would not normally be considered under an elective system if they lack political experience or support.⁶⁴ This staff provides a screening mechanism which the elective system lacks. The federal practice, for example, is to have the attorney general screen likely candidates and make recommendations to the President. The names of proposed candidates are usually investigated by the FBI and are also subject to scrutiny by a special committee of the American Bar Association which rates the candidates and reports this rating to the attorney general. In all cases, the appointee must appear and testify before a sub-committee of the Judiciary Committee of the Senate.⁶⁵

Disadvantages of Executive Appointment

Opponents of the appointive system argue that it is inherently undemocratic because it deprives the people of direct control of the judicial branch; this, of course, is a repetition of Jacksonian democracy philosophy. Purportedly this system encourages the executive to expand his powers by appointing judges who favor his programs and policies. This argument is particularly significant when judges, as in the federal judiciary and Massachusetts, for example, are appointed for lifetime tenure.

Far from divorcing the judiciary from politics, critics point out, political considerations may increase under the appointive method. The appointing official is a political leader subject to the same political pressures as party officials, and he may be encouraged to enlarge his political organization by astute trading of judgeships and judicial patronage. Some critics claim that political considerations may narrow the field from which the judges are chosen if judgeship is being awarded on the basis of faithful party service.⁶⁶ Statistics on the federal judiciary indicate that the President appoints federal judges mainly from his

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own party: between November 1963 and March 1967, 117 of 122 federal judges appointed were of the same party as the President.⁶⁷ Thus, lawyers or judges not active in the executive's political party, though qualified for a judicial post, may not be considered seriously. Dissatisfaction with the federal appointment system led Senator Hugh Scott to introduce a bill creating a Judicial Service Commission to make recommendations to the President when a vacancy occurs.⁶⁸ The proposal is similar to the merit selection plan considered later in this chapter.

Despite criticisms of the executive-appointment system the National Municipal League has taken a firm position in favor of an appointive judiciary holding office, after an initial term of seven years, during life or good behavior. In its Model State Constitution⁶⁹ the League included the following provision:

Sec. 6.04. (a) The governor shall appoint, with the advice and consent of the legislature, the chief judges and associate judges of the supreme, appellate and general courts. The governor shall give ten days' public notice before sending a judicial nomination to the legislature or before making an interim appointment when the legislature is not in session (emphasis added).

(e) The legislature shall provide by law for the appointment of judges of the inferior courts and for their qualifications, tenure, retirement and removal.

In the alternative, however, the Model Constitution provides a plan based on merit selection.

Appointive-Elective System: Merit Selection

The Merit Plan, commonly called the Missouri plan (see Appendix F), the ABA plan (see Appendix E) and the nominating-commission plan, combines aspects of both the appointive and elective systems with a nominating commission. The three elements embodied in this plan include:

1. Nomination of slates of judicial candidates by non-partisan lay-professional nominating commissions;

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2. Appointment by the chief executive or local government of judges from the slate of candidates submitted by the nominating commission; and

3. Review of appointments by voters in succeeding elections in which judges run unopposed on the sole question of whether their records merit retention in office.

By statutory or constitutional provision, fourteen states employ some features of the merit selection plan but few use all three elements (see Table 14). In Alabama, the nominating commission and gubernatorial appointment are used to fill vacancies in one circuit court in Jefferson County;⁷⁰ in California gubernatorial appointment and the retention election is used for appellate court judges;⁷¹ in Illinois the retention election is used for all judges except magistrates,⁷² and in Idaho the nominating commission in the form of a Judicial Council and gubernatorial appointment are used for supreme court and district court judges.⁷³ In New York and Pennsylvania nominating commissions and executive appointment have been voluntarily established by mayors and governors.⁷⁴

Alaska, Colorado, Florida, Iowa, Kansas, Missouri, Nebraska, Oklahoma, Utah and Vermont employ all three steps of the merit plan but only for selection of certain judges. In Alaska, the plan applies to supreme court justices and superior court judges;⁷⁵ in Colorado to all courts of Record and judges of the Denver County Court;⁷⁶ in Florida to the judges of the Metropolitan Court of Dade County;⁷⁷ in Iowa to supreme court and district court judges;⁷⁸ in Kansas to supreme court justices only;⁷⁹ in Missouri to state appellate judges, judges of some city courts in St. Louis and judges of some courts in Jackson County;⁸⁰ in Nebraska to judges of the supreme court, district courts and workmen's compensation courts;⁸¹ in Oklahoma to judges of the supreme court, criminal court of appeals and juvenile courts;⁸² in Utah to supreme, district and juvenile court judges,⁸³ and in Vermont to district and superior court judges.⁸⁴

Nomination

The nominating committee is usually composed of judges, attorneys and laymen, serving staggered terms varying from two to seven years. The number of commission members ranges from five in some states to as many as thirteen in others. Alaska,

TABLE 14

STATES AND LOCALITIES WITH MERIT SELECTION OF JUDGES^{*}

States	Nominating Committee	Gubernatorial or Other Appointment	Non- Competitive Election	High Court	Intermediate Appellate Court	Trial Court	Courts of Limited & Special Jurisdiction
Alabama (Jefferson Co.)	X	X				X	
Alaska	X	X	X	X		X	
California		X	X	X	X		
Colorado (Denver Co.)	X	X				X	X
Colorado	X	X	X	X	X	X	X
Florida (Dade Co.)	X	X	X				X
Idaho	X	X		X		X	X
Illinois			X	X	X	X	
Iowa	X	X	X	X		X	
Kansas	X	X	X	X			
Missouri (Kansas City)	X	X	X				X
Missouri	X	X	X	X	X	X	X
Nebraska	X	X	X	X		X	X
* * New York (City)	X	X					X
Oklahoma	X	X	X	X	X		X
Pennsylvania			X	X	X	X	
Utah	X	X	X	X		X	X
Vermont	X	X	X	X		X	X

*Indiana voters approved a referendum on November 3, 1970, establishing a merit plan approach to selecting justices and judges of the supreme court and the courts of appeal.

* * Some New York City mayors have used nominating commissions on a voluntary basis only.

Source: Advisory Commission on Intergovernmental Relations, State-Local Relations in The Criminal Justice System, Report A-38 (Washington: U.S. Government Printing Office, 1971), p. 198.

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for instance, has a seven-member council composed of the chief justice, three lawyers appointed by the state bar association and three non-lawyers appointed by the governor and confirmed by the legislature in joint session.⁸⁵ The Kansas Supreme Court Nominating Commission has eleven members: an attorney as chairman elected by the state bar; five attorneys, one from each congressional district elected by the attorneys in each district; and five non-lawyers, one appointed by the governor from each congressional district.⁸⁶ The membership of Colorado's supreme court nominating commission is also based on congressional district representation with the lawyer-members appointed by majority action of the governor, attorney general and chief justice.⁸⁷

Most constitutions incorporating the merit plan require commission membership to be either bipartisan or nonpartisan. Members are prohibited from holding any political party position or any other public office, particularly a judicial post. Often these prohibitions extend to a certain number of years after membership on the commission expires; for example, "no commissioner shall be eligible for appointment to judicial office while a commissioner or for five years thereafter."⁸⁸ Additionally, members receive no compensation for their service other than reimbursement of expenses.

When notified by the governor that a judicial post is vacant, the commission usually solicits applications from interested attorneys. The commission sets up its own method for screening applicants and selecting qualified candidates. Names of recommended candidates are submitted in slates of two to six nominees, the number differing in various plans. Most merit plans require the commission to submit its nominations to the governor within sixty days after receiving notice of the vacancy. Once a slate of candidates is submitted, the commission's decision is publicized. Prior to that time commission deliberations should be confidential to avoid embarrassing applicants considered, but not chosen.

In California the Commission on Judicial Appointments has no power to nominate candidates; it is a confirmatory body which acts on interim-vacancy appointments by the governor.⁸⁹ No nomination or appointment by the governor to an interim vacancy in a trial or appellate court is effective unless confirmed by a majority of the three-member commission composed of the chief justice of the supreme court, the presiding judge of the district court of appeals of the affected district and the attorney general.⁹⁰

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Some states have separate nominating commissions for each court level; in Colorado, there are separate trial court nominating commissions for each judicial district as well as one commission for appellate judges.⁹¹ On the other hand, one commission has been employed by some states to serve in areas besides judicial selection. Idaho's Judicial Council conducts studies for the improvement of the administration of justice, acts as a nominating commission for judicial selection and recommends the removal, retirement and discipline of judicial officers.⁹²

In creating a method of judicial selection based on merit selection, the largest problem posed is how commission members are chosen. There are numerous approaches:

Appointment by (a) the governor; (b) governor with confirmation by legislature; (c) legislature; (d) supreme court (lawyer members only), or (e) state bar association (lawyer members only).

Election by (a) all voters in the state, or (b) only voters in certain districts.

The last approach is used when geographical representation is required. For instance, with two congressional districts in Montana, membership could be required as follows: one non-lawyer and one lawyer from each congressional district with the chairman either a lawyer or non-lawyer elected from the state at large, or the chief justice of the supreme court. Geographical representation also can be incorporated into the appointment method by requiring the appointing authority--the governor, legislature or supreme court--to select a commissioner on the basis of residence in a congressional district.

Appointment

The governor is restricted to appointing a judge from the slate of nominees presented by the commission. When the merit plan was first initiated, some governors refused to accept any names submitted; one solution to this problem was submission of new names until the governor found one acceptable.⁹³

Another proposal which most states have adopted is to specify a time period within which the governor must act. If he fails to appoint within that period, the appointive power passes to another individual or group, such as the chief justice, the chairman of the nominating commission, the supreme court or the legislature, which appoints a judge from the original panel of nominees.⁹⁴

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Retention Election

The third element of the merit plan eliminates a political campaign for those judges who wish to retain their offices. The judges selected under the merit plan may be appointed for an initial term ranging from one to three years. During this short term the voters are afforded the opportunity to judge the capability of the appointee. At the end of this trial period the appointed judge must file a declaration of candidacy for election to succeed himself. At the next general election a separate judicial ballot merely asks the voters:

Shall Judge _____ of the _____ Court
be retained in office?

_____ Yes

_____ No

The judge runs on his record alone in this non-competitive election. Usually if a majority of those voting in the general election vote "no" or if the judge fails to file his declaration of candidacy, his office is declared vacant and the process begins anew with nominating and gubernatorial appointment. If the judge is retained in office, his tenure will be for a longer period, as discussed later. At the end of his second term in office he again faces the retention election.

Montana

Adoption of a merit selection plan was considered by the Montana legislature as early as 1945, but was defeated on an unfavorable committee report.⁹⁵ In 1957 the Montana Supreme Court had amassed a three-year backlog of cases caused, in part, by justices' campaigning for re-election in 1956. When the legislature met that year, some representatives felt a solution to the court's backlog was elimination of the election of judges; merit selection was proposed in House Bill 48.

This Montana version of merit selection, which applied only to selection of supreme court justices, consisted of a nominating commission, gubernatorial appointment and a retention election. The nine-member commission would have included five district judges, one from each of five areas into which

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the eighteen judicial districts had been incorporated for the sole purpose of selecting these commissioners; the president of the Montana Bar Association, and three members appointed by the governor with confirmation by the senate.⁹⁶ The latter three members included a resident taxpayer whose primary occupation was farming or the livestock business; a state resident with membership in a generally recognized labor union, and a resident taxpayer engaged in business.⁹⁷ The commission was to nominate a slate of three to five candidates within forty-five days after notification that a vacancy existed.⁹⁸ The governor was to appoint within fifteen days after receiving the commission's nominations.⁹⁹ The appointed judge was to serve an initial term of at least a year before approval or rejection by the electorate in a retention election.¹⁰⁰

House Bill 48 was defeated by a 46-44 House vote primarily because the bill became a party issue; it fate illustrates what could occur if a constitution were to leave the method of judicial selection to legislative dictate.¹⁰¹ Partisan issues can overshadow the procedures necessary to maintain an efficient, qualified judiciary.

Arguments For and Against Merit Selection

The plan is "undemocratic." That was the primary argument used in the 1957 Legislature to oppose the plan. Opponents charged that the plan deprived the people of the right to decide for themselves what members of the legal profession should sit as judges.¹⁰² Critics failed to explain that House Bill 48 merely enlarged upon an appointive-elective system already operating within the state. Because most district judges and supreme court justices were initially appointed by the governor to an interim vacancy and subsequently as an incumbent elected by the people for another term when the appointive term expired, two elements of the merit plan were already in existence: gubernatorial appointment and retention election. The merit selection plan simply would have added a nominating commission to restrict the governor's choice to candidates the commission deemed qualified. Through citizen representation on the nominating commission the electorate in effect would have had a voice in the initial choice of a judge--an element nonexistent under Montana's present system.

Other arguments against merit selection include:

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--Nominating commissions tend to accommodate the wishes of the governor by placing his "preferred" candidate on the list of nominees.¹⁰³ One member of a commission set up voluntarily by the Mayor of New York City pointed out that if the mayor suggested a lawyer to the commission, it was almost certain that the mayor would appoint that attorney if his name was on the panel submitted.¹⁰⁴

Reply. The influence of the appointing authority, be it the governor or a mayor, on the members of the commissions depends on the integrity of the commissioners chosen to do the job. Bipartisan representation on the commission would prevent a governor from "railroading" his choice through the commission. The influence of a mayor over a commission he "voluntarily" creates is entirely different from a commission created and empowered by a constitution.

--Because nominating commissions usually are composed of lawyers and judges, their orientation in judicial selection will be to emphasize strictly technical abilities rather than the needs of the community. This may lead to nomination of "silk stocking" candidates--that is lawyers from prestige law firms.¹⁰⁵

Reply. Experience in states that use merit selection plans indicates that individual practitioners and members of small law firms have been appointed along with members of large law firms.¹⁰⁶ The question of whether strictly technical legal abilities or the needs of the community should receive prime consideration reflects a misconception in the judge's role in society. Constitutions and legislation reflect the needs of the people; judges merely interpret these documents. Further, the people under a merit selection plan have the right to remove those judges from office if they are dissatisfied with their performance.

--This plan diffuses responsibility for appointing judges because governors can claim that they were prevented from making better judicial appointments by the inferior quality of nominations made by the commission.¹⁰⁷

Reply. A merit plan could provide that if the governor feels the candidates nominated on the first panel are inferior, he has the right to request that another list be submitted. If he fails to appoint from the second list, then the appointive power passes to another individual or group. Nomination of inferior candidates may not, in fact, be caused by poor choice on the part of the commission; it may reflect a disinterest of successful practicing attorneys in poorly paid judicial positions.

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--The fact that only one Missouri judge has been defeated in a retention election since the plan went into effect in 1940 proves that this plan gives judges lifetime tenure, making it impossible to remove incompetent judges.¹⁰⁸

Reply. On the contrary, the defeat of only one judge may prove that merit selection in fact puts competent judges on the bench. Obviously if the people are dissatisfied and exercise their right to vote, a judge will be removed. This contention may reveal public apathy in general towards judges and refute the argument that the public should have the right to choose judges through elections. If they do not remove incompetent or unqualified judges, how can they choose them initially?

--There is no reason that in the retention election voters would be better informed about a judge's qualifications after one or two years on the bench than they were before he was appointed.¹⁰⁹

Reply. The public rarely knows in advance how capable a judge is, but this trial period before a retention election allows the public to examine his record and ascertain the facts before making a decision. A practice has developed in Missouri whereby the attorneys through secret ballots rate the performance of individual judges; this rating is published prior to the judge's retention election. The effect of this poll was explained by the former president of the Missouri Bar Association:

Some may fear that because judges are appointed under the nonpartisan system and do not have to run for political office in the usual sense, they are not sensitive to public opinion or criticism and that they are as independent as federal judiciary personnel. This is not the case. Each year the Missouri Bar conducts a poll of its members on the question of whether the judges who are running for re-election in that year deserve to be retained in office. As to supreme court members, this poll is taken from all the lawyers in the state; as to appellate court judges, among the lawyers of the appellate districts; and in circuit court districts where the judges are under the nonpartisan system, from the lawyers of the circuit. The results of the

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poll are tabulated and widely disseminated in the news media. Every judge is sensitive to the standing which he occupies in the judicial poll. The fact the judge knows that the manner in which he is regarded by the lawyers will be made public influences his conduct on the bench. He would be less than human if he did not believe the opinion of his fellow lawyers so published indicated to some degree the caliber of his work and his fitness for the office which he holds.¹¹⁰

Adherents of the merit plan contend that it is the most progressive step in gaining a more qualified judiciary. The plan retains important advantages of the appointive scheme--that is, participation in the selection process of an authority (the governor) who is qualified and able to assess judicial candidates and who is directly answerable to the people,¹¹¹ while assuring that ultimate control of selection is in the electorate through the retention election. Elimination of campaigns for re-election frees the judge from political pre-occupations and grants him more time to attend to judicial duties. The security of tenure provided by the plan attracts lawyers who would not have submitted themselves to the ordeals of the old system. Public confidence in merit selection has been good in Missouri. Retention of this system by the people of Missouri reflects public confidence in the plan. In 1940 the plan was adopted by a 90,000 vote majority. Resubmitted in 1942 at the insistence of opponents who argued that the people had not understood the plan, voters re-endorsed it by a 180,000 majority.¹¹²

Another advantage in using a nominating commission is that standards and criteria for rating and selecting judicial candidates can be developed. Furthermore, commissioners can develop expertise in evaluating a applicant's qualifications and offer comparative judgment in choosing candidates. One-man judicial selection is eliminated. Critics, however, point out that there is nothing to prevent a nominating commission from using the same partisan considerations to select a candidate that a governor might use. Complete elimination of political influences in judicial selection is probably an unrealistic goal, but the merit plan minimizes political considerations far more than the elective and appointive methods through bipartisan representation on the commission. The thirty-two years of experience in Missouri shows that the commissions work well to reduce partisanship; one Democratic governor of

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Missouri appointed eight Democrats and seven Republicans during his term of office, although he could have appointed Democrats in each case.¹¹³

Comparison of the Elective System With Merit Selection. In comparing the operation of merit selection in Missouri over a twenty-five year interval with the preceding elective system, a recent study yielded these conclusions concerning the Missouri Plan:¹¹⁴

1. There is a greater tendency for graduates of night law schools to ascend to the bench than lawyers from national "prestige" law schools.

2. Appointees are essentially "locals", that is, persons born and educated in the state, rather than "cosmopolitans."

3. Despite the claims that merit selection results in nonpartisan judicial selection, the authors of the study claimed that more appointees were affiliated with the state's majority party than when judges ran in partisan contests.

4. Older lawyers have been appointed to the bench. The average age has risen from the 40s to the 50s.

5. Appellate judges appointed under the plan have had more service on lower level courts than was the case under the elective system in Missouri.

6. There is a growing trend for appointees to have had prior experience in a law enforcement position, particularly as a prosecutor.

7. Contrary to criticisms of the plan, merit appointees are not more conservative than those elected in partisan contests.

8. Members of the Missouri Bar generally agree that the plan has resulted in putting "better" judges on the bench than those chosen by election.

9. In effect, merit selection judges enjoy lifetime tenure. In this regard, the authors noted:

A great number of [attorneys] argue that this independence is desirable because it permits a judge to make decisions based on the merits of

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the case, rather than subjecting him to the pressures that elective judges must often face under threat of being voted out of office. However, some of them view this judicial independence as not entirely salutary, since it "federalizes" some judges, that is, tends to make them arbitrary in the treatment of lawyers and laymen with business before the courts. (Attorneys who are active in trial courts are most likely to suggest this tendency; a number of them oppose the Plan for this reason.) Presumably, elective judges are more sensitive to the feelings of the Bar and public on such matters, because these groups are in a position to make their influence felt at the time of the next election.¹¹⁵

10. Cleavages have developed in Missouri's legal profession whereby rival groups nominate candidates and conduct campaigns to get their nominees elected. These bar elections have taken on many features of the general party system.

The issue of judicial selection poses considerable conflicts, primarily of a philosophical nature. Here the opposing doctrines of judicial independence and popular control of the judiciary, described in Chapter I, will be most significant. Inherent in the resolution of this philosophical dispute is the question of which method of judicial selection facilitates the best administration of justice. Subsequent considerations may be whether the method should be applicable to all judges; to what detail it should be enumerated in the constitution, and should it be self-executing or dependent upon legislative implementation.

Thus far, systems employed throughout the United States have been considered; however, methods of judicial selection in other nations provide an interesting point of comparison.

Judicial Selection in Other Countries¹¹⁶

The highest judicial officer in England is the Lord Chancellor. He is followed in the judicial hierarchy by the Lord Chief Justice, the Master of the Rolls, the President of the Probate, Divorce and Admiralty Division of the High Court. Then there are seven Law Lords and five Lord Justices of Appeal. The Prime Minister of England fills vacancies in these positions.

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The Lord Chancellor is the presiding judge of the House of Lords, England's highest tribunal. He is appointed by the Queen upon recommendation of the Prime Minister. The office is political in that a new Lord Chancellor usually is appointed when there is a change of government. The Lord Chancellor recommends appointments to the High Court of England, fifty-six county courts and certain courts in London. In total, he can appoint almost 18,000 persons to the bench.¹¹⁷

Although judicial selection would seem to be dominated by political influence, British tradition commands that the Lord Chancellor's appointments be non-political with primary emphasis on judicial ability and judicial independence.

English judges usually are selected from barristers, particularly from those serving as Queen's Counsel. The Lord Chancellor's office maintains a permanent staff which continually compiles information on leading barristers and prior to appointment, the Lord Chancellor consults with the head of that division of the court to which an appointment will be made. Although information is sought about candidates, any attempt to influence judicial selection, such as a letter of recommendation from an influential person, is not tolerated.

In evaluating the English system, one writer concludes:

[W]e find that the British system of judicial selection places reliance upon appointment of judges in part by the principal judicial officer in the hierarchy and in part by the principal executive official. These men exercise their uncontrolled discretion, but notwithstanding our general belief that discretionary authority in governmental affairs is an evil to be avoided so far as possible, we must concede that the influence of the high British traditions of public service has resulted in guiding the discretionary authority of the Lord Chancellor and the Prime Minister to the end that throughout the centuries the ability of the British bench has been of the highest order. Moreover, once appointed, the judges have justifiably deemed themselves quite independent of outside influences. They have reached their decision upon the law and the facts as they saw them. Their judicial ability has been such that we in this country never cease to wonder over the craftsmanship, skill, and learning displayed by them in rendering their opinions, which are almost invariably delivered immediately after the close of the trial and quite extemporaneously.¹¹⁸

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Following the Revolution in 1790, French judges were elected by popular vote. As qualifications for judicial office were lowered to allow anyone except domestic servants and apprentices to be candidates, dissatisfaction with judicial quality led to incorporation of the appointive system into the French Constitution.

The legal system of France bears little similarity to the Anglo-American legal process. There is public prosecution whereby judges pass freely from the bench to act as government attorneys and back again to the bench; a complete absence of civil juries; less emphasis on advocacy; a decentralized court system, and a system of administrative courts separate from ordinary courts of law. Correspondingly, the French method of judicial selection is unlike its English counterpart, but has been copied by most European countries. The core of the "Continental system" is professional training of judges. Upon finishing law school, the student chooses to enter either active law practice or the "magistrature," the judiciary. To enter the magistrature one must pass rigid examinations; thereafter, as vacancies arise, one enters the lower ranks of the judicial hierarchy, usually at the age of 25. Elevation to higher court positions depends on ability and promotions with a seat on the Court of Cassation, the French Court of Last Resort, the ultimate goal. Initially the Minister of Justice was responsible for appointments and promotions; however, in 1934 these tasks were assigned to a five-member judiciary commission composed of the president of the Court of Cassation; two associate judges of that court selected by the court; a president of a court of appeals selected by all the presidents of courts of appeal, and one other judge selected by the trial courts. This commission, along with a non-voting representative of the Department of Ministry, submits a list of three nominees for each vacancy from which the Minister of Justice must make his selection. The list is comprehensive, including all judges in service and those students who have passed the magistrature examinations.

The Continental method of judicial selection combines a professional training and apprenticeship of persons solely for judicial service with a method of appointment and promotion by a judicial administrator who is restricted in his choice to a slate of candidates determined by high-ranking, experienced judges. The system, however, has been criticized for the jealousy bred by competition for promotions and for lack of practical experience in law practice among French judges.

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It also is noteworthy that except in the very lowest courts a French judge never presides over a case alone; most French trial courts consist of three judges.

In Latin America practically all judges are appointed. Judges of the supreme court are appointed in some countries by the president and in others by the legislature. Lower court judges are appointed by the supreme court. In Peru, Chile, Bolivia, and Brazil appointments are made from a list of names submitted by the supreme court, a method similar to the French procedure.

In India supreme court justices are appointed for life by the president usually after consultation with higher court judges. Trial court judges are appointed by the president with the advice of the Chief Justice of India, the governor of the state in which the appointment is made and the chief justice of the particular high court.

In Thailand there is only one class of judges, who are civil officers appointed by the Ministry of Justice. Selection is based on competitive examinations after which four years is spent in the practice of law. Promotion from lower courts to higher courts is by discretion of the Minister of Justice, who has complete political control over the entire system.

In Japan candidates who pass judicial examinations prepared by the Supreme Court are appointed as judicial apprentices for two years. Following the apprenticeship another examination must be passed in order for the candidate to be eligible for an assistant judgeship, which is attained on appointment by the Cabinet from a list of nominees submitted by the Supreme Court. After ten years of service as an assistant judge, appointment to higher courts is likely if the judge is competent. These appointments are made in the same manner as assistant judges, with the exception of the justices of the Supreme Court. The Chief Justice is appointed by Emperor as designated by the Cabinet and Associate Justices are appointed by the Cabinet directly. Appointments to the Supreme Court are reviewed by the people at the first general election following appointment and every ten years thereafter. These justices run against their record in non-competitive retention elections. The Japanese system, therefore, combines appointment of judges with tenure dependent on voters' satisfaction with the quality of judicial service.

In Canada¹¹⁹ there are two courts with national jurisdiction: the Supreme court of Canada, the tribunal of last resort, and

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the Exchequer Court, which handles suits against the Crown including appeals from the Income Tax Appeal Board. The court structure of each province includes a Court of Appeal, a supreme court which divides trial jurisdiction with district or county courts based on the size of the claim, and minor courts similar to American municipal courts.

The British North America Act of 1867 provides that provincial judges of the superior, district and county courts shall be appointed by the Governor General. Through legislation implementing this act, the Governor General is authorized to appoint judges to the two national courts. In practice, however, the Canadian Cabinet selects members of the supreme and exchequer courts from candidates recommended by the Minister of Justice. An order is drafted, signed as a matter of course by the Governor General, and published in the official Canada Gazette to give legal effect to the Cabinet's choice. In absence of express authorization for Dominion control, selection of remaining provincial courts seems vested in the provinces.

As in the United States, most of the Canadian selections rest on political patronage considerations rather than merit. Reform in judicial selection, although advocated in many quarters, has not succeeded.¹²⁰

In Norway, Sweden and Denmark judges are appointed by the national administration for life, subject only to a mandatory retirement age or removal for cause. It is noteworthy that these countries which have instituted some of the most democratic practices reject popular election of judges.

As in France, Scandinavian countries have no juries in civil cases and only a limited use of juries in criminal cases. In Sweden only cases involving freedom of the press have jury trials. A common practice in these countries is to have laymen sit as judges. In Norway one judge sits with two laymen in some trial courts; laymen also are required to sit on an appeal if the trial court contained lay assistants. In Sweden trial courts may contain one judge and from three to twelve laymen elected from the area in which the court is situated. Their vote can overrule that of the judge. The lack of juries in most instances is thus offset by the use of laymen in judicial decision-making.

Although the 1936 Constitution of the U.S.S.R. states that "the judges shall be independent and subject only to the law,"¹²¹

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the court actually is regarded as a mere agency of governmental administration, carrying out Soviet state policy. Lower court judges or "peoples' judges" are elected by popular vote. Judges of higher courts are elected by Soviet representative assemblies. In 1947 64 percent of the Soviet judges lacked any legal training whatsoever; only 14.6 percent had any legal training on the university level.¹²² The Soviet judiciary is controlled by the federal Minister of Justice, the Minister of Justice of the Republic and the heads of Regional Bureaus of the Ministry of Justice, all of whom are authorized to inspect the courts to determine if correct law is applied in civil and criminal cases, to sanction those judges who violate "labor discipline" or to recommend removal of judges. Thus, according to one critic, "the judge becomes more or less a pawn in the hands of a political administration."¹²³

This brief analysis illustrates that in most major countries, judicial ability and independence is sought through the appointive method of judicial selection rather than through popular election of judges as is employed in the United States and the U.S.S.R. Many nations, in fact, tend to stress a civil service approach requiring competitive examinations and apprenticeship. However, without analyses of the performance of individual foreign judges, it is difficult to conclude whether in practice these approaches to judicial selection result in judges of a superior quality.

QUALIFICATIONS OF JUDGES

A judge's decisions are in large part the product of, first, what man and lawyer he is when he ascends the bench and, secondly, what he absorbs once there.¹²⁴

Once the method of selecting judges has been determined, the next question is what qualifications for judicial office should be set in the constitution. While there may be a tendency merely to retain existing qualifications, the issue gains greater consequence in relation to retaining or eliminating justice of the peace officers--a question discussed previously. In other words, should officers on all court levels have law degrees?

The pros and cons of requiring legal training for all members of the judiciary was summarized in a recent report by the Advisory Commission on Intergovernmental Relations:

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Information on State prescription of qualifications for lower court judges is fragmentary. What is available, however, indicates that training and experience qualifications are less prevalent in these courts than in the appellate and general trial tribunals. Thus, in 1965, of the 37 States that still had JP courts, 28 had no requirement for legal training for the office In general. . . the minor courts in rural areas have less stringent qualifications for their judges than those in the urban jurisdictions. A 1964 survey of the minor courts in the 100 largest metropolitan areas in the United States showed very few in which judges were not required to be lawyers.

Considering the lower courts' share of the overall criminal justice burden and their pivotal position within the existing system, a strong case can be made for establishment of minimum training and experience qualifications for judges of these courts. Nonurban areas, however, have a problem with establishing qualifications that urban areas do not have. Stringent residence requirements, if coupled with a requirement that all judges be lawyers, may well leave some courts in these areas without judges. In at least two States, legislatures have recognized this problem by providing that in the absence of qualified personnel a judge may be chosen from non-lawyers or from lawyers in another part of the State.

Thus, the issue of qualifications is related to the structure of the court system. It may be necessary, as suggested above, to structure the lower courts in the nonurban and rural areas in such a way as to assure the availability of a pool of potential candidates for the judicial office for which qualifications are to be established.

Legal training and experience seem an obvious prerequisite for judicial office. Yet this proposition has not and does not meet with complete acceptance. Some contend that character, integrity, and independence are the prime traits of a good judge and these are not the inevitable byproducts of a career in law. Some argue that a formal requirement only enhances the aloof, status-quo and unresponsive propensities of the judiciary, since, so the argument runs, legal training tends to be

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narrow, quasi-mechanistic, and tradition-bound. Some also raise the question: What kind of legal experience is best? And by way of an answer, they point out that many of our best judges have never had prior judicial experience, that some have never even practiced law or pled a case; and that some with a solid background in the law have proven to be mediocre. These critics conclude that non-lawyers as well as lawyers should be on the bench, particularly at the high appellate level where final decisions on controversial matters of social, economic, and constitutional importance are made.

On the other hand, supporters of the requirements of legal experience point out that the nonlegal, political aspects of judicial decision-making are inescapable in a human institution. The significant thing, they maintain, is that judges have legal training to recognize precedent and know the restrictions established over the years by the collective judgment of the bench. Only within these constraints of precedent and tradition can the judge effectively exercise his "freedom" of choice. Only within these limits can a judge effectively curb the natural tendency to apply his own social and economic predilections to a case. Also, the legal training requirement does not preclude judges from being broadvisioned and sensitive to current social and economic conditions. Witness such giants as Hand, Harlan, Holmes, Brandeis and Cardozo. Finally, the bulk of the questions that State and local judges rule on are not susceptible of being treated as political, but mainly require the applications of rules of conduct about which there is little dispute to a range of factual situations. Legal training is essential in these cases to insure that the right rule of conduct is applied.¹²⁵

Montana's 1889 Constitution states four qualifications for supreme and district court judges that are commonly provided by most state constitutions:¹²⁶

--Minimum age (30 for supreme court and 25 for district court);

--United States citizenship;

--Admission to the practice of law, and

--State residence (two years for supreme court and one year for district court).

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District judges need not reside in the district to be eligible for election to its judgeship but upon election, the judge must take up residence within the district he is to serve.¹²⁷ Qualifications for all other judicial officers was left to legislation. There are only two statutory requirements for justices of the peace: U.S. citizenship and residence in the county in which he is to serve for at least one year preceding his election.¹²⁸ Statutory eligibility requirements for police or municipal court judges are as minimal.

The most common qualifications required of appellate and trial court judges are summarized in Table 15. More than three-fourths of the state constitutions explicitly prescribe federal or state citizenship as a prerequisite for office. Residence in the state or district is required in forty states, the number of years ranging from one year to ten years.

Forty-one states require judges to be members of the legal profession, but the growing trend is to stipulate a certain number of years of legal experience, varying length from four to ten years. Hawaii's Constitution states:

No person shall be eligible for the office of justice or judge unless he shall have been admitted to practice law before the supreme court of this State for at least ten years. [Art. V, Sec. 3]

The National Municipal League's Model State Constitution includes a minimum period of admission to practice law as its sole eligibility requirement¹²⁹ while the American Bar Association's Model Judicial Article omits this requirement and suggests only federal citizenship, state residence and a license to practice law within the state (see Appendix 3).

A recent survey of lawyers and judges in Utah and Nevada indicated that at least ten years of extensive law practice was the highest rated attribute of a judicial candidate while legal training at a law school and at least ten years of trial experience as a lawyer rated second and third respectively.¹³⁰ Requiring a certain period of law practice is an alternative to prescribing a minimum age because a period of practice usually guarantees that a certain age has been attained.

Another age-based, requirement is to provide a maximum age limit (see Table 15). In Idaho and Michigan, judges must be less than 70 at the time of election or appointment; in Iowa, judges must be of an age to serve an initial term and one regular term of office before reaching 72. A fixed rule of the American Bar Association's Senate Judiciary Committee is

TABLE 15

QUALIFICATIONS OF JUDGES OF STATE APPELLATE COURTS
AND TRIAL COURTS OF GENERAL JURISDICTION

State	U.S. Citizenship		Years of Minimum Residence		Learned in the Law		Years of Legal Experience		Other	
	A.*	T.*	In State A.*	In District T.*	A.*	T.*	A.*	T.*	A.*	T.*
Alabama	x	x	5	5	x	x				
Alaska	x	x	3	3	x	x	2 ^a	5	x ^a	x ^a
Arizona	x	x	10 ^b	5	x	x	30 ^c	10 ^d	x ^{a,d}	x ^d
Arkansas	x	x	2	2	x	x	30	3	x ^d	x ^d
California	x	x			x	x	28	6		
Colorado	x	x	1	1	x	x	31	10	x ^a	x ^a
							5	5		
Connecticut										
Delaware	x	x			x	x			x ^a	x ^a
Florida	x	x	(e)		x	x	31		x ^{a,e}	x ^a
Georgia	x	x	3	3	x	x	30	7		
Hawaii	x	x	1	1	x	x		10	x ^a	x ^a
Idaho	x	x			x	x	30		x ^{a,f,g}	x ^{f,g}
Illinois	x	x			x	x			x ^{a,e}	x ^{a,e}
Indiana	x	x	5	5	x	x	30		x ^a	x ^a
Iowa	x	x			x	x	21		x ^{a,g}	x ^{a,g}
Kansas	x	x	x	x	x	x	30	4		
Kentucky			5	2	x	x	35	8	x ^e	x ^e
Louisiana			2	2	x	x		10 ^h	x ^{a,f}	x ^{a,f}
Maine	x	x			x	x				
Maryland	x	x	5	5	x	x	30		x ^f	x ^f
Massachusetts	No local qualifications				x	x			x ^{a,d}	x ^{a,d}
Michigan					x	x			x ^{a,g}	x ^{a,g}
Minnesota					x	x	21	x	x ^f	x ^f
Mississippi			5	5	x	x	30	x	x ^f	x ^f

TABLE 15 (Continued)

State	U.S. Citizenship		Years of Minimum Residence		Learned		Years of Legal Experience		Other	
	A.*	T.*	A.*	T.*	A.*	T.*	A.*	T.*	A.*	T.*
Missouri	x	x	9 ¹	3 ¹	x	x	30	30	x ^f	x ^f
Montana	x	x	2	1	x	x	30	25	x ^a	x ^a
Nebraska	x	x	3	3	x	x	30	30	x ^a	x ^a
Nevada	x	x	2	2	x	x	25	25	x ^{a,f}	x ^{a,f}
New Hampshire	No legal qualifications									
New Jersey	x	x	10	10	x	x	31	31	x ^a	x ^a
New Mexico	x	x	3	3	x	x	30	30	x	3
New York	x	x	x	x	x	x	21	21	x	x
North Carolina	x	x	1	1	x	x	21	21	x ^{k,f}	x ^{k,f}
North Dakota	x	x	3	2	x	x	30	25	x	x
Ohio	x	x	1	1	x	x	21 ¹	21 ¹	(a)	(a)
Oklahoma	x	x	1	1	x	x	30	21 ¹	(m)	(m)
Oregon	x	x	3	3	x	x	21	21	x ^a	x ^a
Pennsylvania	x	x	1	1	x	x	21	21	x ^{a,e}	x ^{a,e}
Puerto Rico	x	x	5	5	x	x	25	25	x ^a	x ^a
Rhode Island	x	x	2	2	x	x	21	21		
South Carolina	x	x	5	5	x	x	26	26	5	5
South Dakota	x	x	2	1	x	x	30	25	x	x
Tennessee			5	5	x	x	35 ⁿ	30	x	x
Texas	x	x	x	x	2	2	35	25	10	4
Utah			5	3	x	x	30	25	x	x
Vermont	x	x	x	x					x ⁵⁰	x
Virginia	x	x	x	x			21	21	5	5
Washington	x	x	1	1	x	x	21	21	x ^a	x ^a
West Virginia	x	x	5	5	x	x	30	30	x ^f	x ^f
Wisconsin	x	x	6 months	6 months	x	x	25	25	x ^{a,f}	x ^{a,f}
Wyoming	x	x	3	2	x	x	30	28	x ^p	x ^p

TABLE 15 (Continued)

*Explanation of symbols:

- A. Judges of courts of last resort and intermediate appellate courts.
- I. Judges of trial courts of general jurisdiction.
- x Indicates requirement exists.
- a Member of, or admitted to, bar. In Nevada, licensed and admitted to practice law in all courts in State.
- In Connecticut, shall not engage in private practice.
- b For court of appeals, 5 years.
- c For court of appeals.
- d Good character; in Maryland, integrity, wisdom.
- e State citizenship.
- f Qualified voter; in Nevada, qualified elector in State for supreme court justices; in State and district for trial court judges.
- g In Idaho and Michigan, judges must be under 70 at time of election or appointment, in Iowa, must be of such age as to be able to serve an initial and one regular term of office before reaching 72.
- h In Louisiana, supreme court, 10; court of appeals, 6.
- i Sobriety of manner.
- j Required number of years as qualified voters.
- k Belief in God.
- l Associate district judges required to be licensed to practice in the State, number of years of practice and age not specified. Footnote (n) not applicable to them.
- m Shall continue to be licensed attorney while holding office.
- n Thirty years for judges of court of appeals and court of criminal appeals.
- o Five out of 10 years preceding appointment or election.
- p Shall have practiced law in the State at least one year immediately preceding election or appointment.

Source: The Council of State Governments, State Court Systems, Report RM-446 (Lexington, Ky., Revised 1970), pp. 16-18.

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that no one who has reached 64 will be approved for a federal judicial post or if already on the bench, for advancement to a higher court.¹³¹ If a lawyer has reached 60, the ABA will disqualify him from approval unless he is found to be both well qualified and in excellent health.¹³²

The Convention may wish to consider a practice prevalent in many foreign countries whereby judges are promoted from one level of courts to another on the basis of ability and years of service. Should supreme court justices in Montana be required to have experience on a lower-court bench? While high-ranking positions in most occupations and businesses are acquired by experience or apprenticeship, a Montana supreme court or district court judgeship can be acquired with a law license. Justices of the peace or police judges need neither experience nor a high school education. If inferior court judges in Montana should be required to have law degrees, these positions could become the training ground for future district court or supreme court positions. Even maintaining existing requirements, district judgeships could be the training and experience required of supreme court justices.

Most writers in the area of judicial qualifications conclude that it is difficult, if not impossible, to pinpoint the criteria which adequately describe the ideal judge. Judicial characteristics are both definite and capable of measurement--such as age, experience, citizenship--and intangible, incapable of specific measurement, such as integrity, honesty and courtesy. One analyst polled trial judges whose judicial service ranged from one year to many decades and discovered that qualities they rated highest in a judicial candidate were intrinsic, personality traits, not external achievements.¹³³ High on their lists were moral courage, decisiveness, reputation for fairness and uprightness, patience, good physical and mental health and consideration for others. Surprisingly, these qualities do not relate uniquely to law nor are they peculiar to lawyers and judges. Furthermore, they are subjective and hard to measure. Those qualities which rated lowest among the judges polled were activity in professional associations, above-average law school records and past activity in civil or political affairs.

The criteria used by the New York City judicial nominating commission between 1962 and 1964 included the following:¹³⁴

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1. Personal qualities and characteristics:
 - a. character: moral vigor or ethical firmness and imperviousness to corruption or venal influences
 - b. patience (judicial temperament): capacity to exercise forbearance under provocation (to suffer fools gladly)
 - c. humility and tolerance: capacity to listen with a mind intent on understanding the ideas or arguments being advanced and with an appreciation that certainties of today may become the superstitions of tomorrow
 - d. zeal and capacity for work: key to judge's efficient and proper administration of judicial functions
 - e. common sense: important to have ability to make practical and reasonable judgments
 - f. tact: sensitivity to feelings of others and capacity to deal with others without giving offense
2. Preparatory education and training:
 - a. education and early years at the bar, to learn how well he performed in college and law school and what early associations he formed
 - b. any teaching, lecturing, or writing
 - c. trial and courtroom experience (not necessary for appointment but a plus factor in selection and a guide meriting consideration)
3. Professional attainments and special experience:
 - a. cultural interests and affiliations
 - b. community activities
 - c. participation in bar association work
 - d. participation in civic and political activities
 - e. specialized knowledge and experience
4. Political, ethnic and other affiliations: should be used as negative criteria in providing a well-balanced slate of nominees.

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The qualities stressed by the American Bar Association's Senate Judiciary Committee, which rates contenders for federal judicial positions, include character, judgment, industry, experience, judicial temperament and professional ability.¹³⁵

Another issue concerning judicial qualifications is what should be constitutionally prescribed. This problem is directly related to which method of judicial selection is chosen. If merit selection with a nominating commission is utilized, the commission may be best equipped to determine what qualities are necessary for Montana judges. The constitution may set out minimum requirements or may merely state that judges "shall possess such qualifications as may be prescribed by law." In Montana, legislation states the same requirements for supreme court and district court judges as provided in the 1889 Constitution;¹³⁶ however, leaving qualifications to legislation also means they are open to the possibility of repeated changes. An alternative to leaving the definition of judicial qualifications to the legislature would be to empower the supreme court to define qualifications through its rule-making authority.

Qualification of judges provides the framework for gaining a more qualified judiciary. The Convention must resolve what qualifications should be included in the judicial article and whether these qualifications should be uniformly applied within the state.

REMOVAL AND DISCIPLINE

Impeachment is the sole method the Montana Constitution provides for removing supreme court and district court judges. The Constitution states:

The sole power of impeachment shall vest in the house of representatives; the concurrence of a majority of all the members being necessary to the exercise thereof. Impeachment shall be tried by the senate sitting for that purpose, and the senators shall be upon oath or affirmation to do justice according to law and evidence. When the governor or lieutenant-governor is on trial, the chief justice of the supreme court shall preside. No person shall be convicted without a concurrence of two-thirds of the senators elected.

The governor, and other state and judicial officers, except justices of the peace, shall be

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liable to impeachment for high crimes and misdemeanors, or malfeasance in office, but judgment in such cases shall only extend to removal from office and disqualification to hold any office of honor, trust, or profit under the laws of the state. The party, whether convicted or acquitted, shall nevertheless, be liable to prosecution, trial, judgment and punishment according to law.

All officers not liable to impeachment shall be subject to removal for misconduct or malfeasance in office, in such manner as may be provided by law.
[Art. V, Secs. 16-18]

All other judicial officers are subject to removal by legislative provisions.¹³⁷ Experience here and in other states indicates that there is a question whether impeachment alone meets the disciplinary requisites necessary to maintain a competent, efficient judiciary. Although the judges' pension plan in Montana requires retirement at the age of 70 in order to receive benefits,¹³⁸ there may be instances where retirement is necessary before that age is reached. The Convention, then, may wish to consider other procedures. Experimentation in this area by other states, discussed below, should point out pitfalls to be avoided as well as adaptable techniques.

A procedure for the discipline and removal of judges is designed "to provide a workable system for taking remedial action when a judge, through fault or disability, fails to execute properly a the duties of his office."¹³⁹ Such a procedure works hand in hand with a method of judicial selection toward the goal of improving the quality of judges. But the tendency among advocates of judicial reform has been to stress judicial selection as if to imply that once the most qualified personnel are on the bench, the instances necessitating removal or discipline will be lessened. While this may be the ideal to strive for, it is doubtful that cases of the senile judge, or the corrupt judge, or the drinking judge will ever be eliminated completely. "Judges are human beings. Perfection is unattainable. The difficult problem, therefore, is where to draw the line short of perfection."¹⁴⁰

Choice of removal and disciplinary procedures and standards usually are motivated by two seemingly inconsistent attitudes. On the one hand, the public needs to be assured that judges, as administrators and creators of the law, are fulfilling their positions of public trust with the utmost impartiality, integrity, and ability. On the other hand, judicial supervision should be restrained because judges need freedom to perform their duties without fear of reprisals. According to one writer:

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A major justification for limiting scrutiny of the judiciary for purposes of discipline or removal is the need to preserve judicial independence. Although "judicial independence" has two meanings, in this context it does not refer to the independence of the judiciary as an institution from control by other branches of government, but to the right of the individual judge to exercise his office within his view of the law, without fear of repercussions merely because of those views. The premise underlying this position is that if judges need fear reprisals for being deemed wrong, the judiciary will become so docile that new ideas and approaches will never come to light. Moreover, certain cases might be decided by the removal and disciplinary authority rather than by the judiciary. Although, absent close supervision of the judiciary, litigants will suffer and gain justice only after costly appeals from wrong decisions, these evils must be tolerated to some extent as the price we pay for the law's growth.¹⁴¹

Some are opposed to any supervision of judicial conduct. They argue that: (1) maintaining ethical standards should be left to the conscience of the judge; (2) unless a judge's acts amount to criminal conduct, judicial derelictions should not be the subject of sanctions; (3) disciplinary machinery harms innocent people by giving unscrupulous individuals and newspapers an excuse for unwarranted attacks on judges and a club with which to gain personal advantage and (4) standards of conduct are maintained by surveillance of bar associations, public and press, and the influence of judicial colleagues.¹⁴² Unfortunately, the general public has scant knowledge of judicial performance. Those most cognizant of judicial incompetence, it is argued, are members of the legal profession who have regular contact with judges. Yet attorneys are reluctant to actively campaign for stricter supervision of judicial behavior for fear of reprisal by members of the judiciary. Self-regulation easily fails from self-interest. As one expert in the area of judicial removal and discipline remarks;

To maintain that a judge should be restrained only by his conscience is to restate the divine rights of kings in a different guise. The concept of an independent judiciary does not necessarily entail the immunity of judges from the rule of the law¹⁴³

It is apparent that the method chosen must satisfy the public that a check does exist to curb judicial incompetence, but that

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some protection must be afforded the judiciary to prevent unfounded charges and accusations from damaging a well-qualified judge or seriously undermining the judicial function.

Systems Presently Employed

Traditional Methods

Traditionally, most states have used impeachment, address and recall, singly or in combination, to remove judges. Growing dissatisfaction with these means has led to innovations directed not only at removal of judges for flagrant abuse of office but to disciplinary measures for less notorious misconduct.

Impeachment, the oldest of the removal procedures, is incorporated into the constitution of every state except four: Delaware, Indiana, Hawaii and Oregon¹⁴⁴ It is a legislative procedure whereby the House of Representatives prefers charges, by a majority of all its members, and the Senate, sitting as a court of impeachment, tries the accused. Half the states, including Montana, require concurrence of two-thirds of the members elected to the Senate for conviction;¹⁴⁵ the federal Constitution requires only two-thirds of those present.¹⁴⁶ If a judge is impeached in Montana, he may be suspended or removed from office and disqualified from holding future state office. The conviction is final; no appeal or pardon is available. Furthermore, the accused is subject to criminal prosecution whether he is convicted or acquitted in the impeachment proceeding.

One complaint with impeachment as a disciplinary procedure is that it rarely is used:

Parliament has not impeached and removed a Government officer since Viscount Melville was tried for misappropriating Royal Navy funds in 1806. In the United States the House of Representatives has impeached only 8 federal judges since 1789; the Senate has convicted only 4. The last impeachment and conviction of a federal judge was in 1936 - Halstead L. Ritter, District Judge for the Southern District of Florida. Replies to a 1960 bar survey indicated that state legislatures have attempted impeachments in only 17 states on 52 separate occasions, resulting in 19 removals and 3 resignations. These statistics illustrate what critics have said

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since the Constitutional Convention in 1789: impeachment is a totally inadequate procedure to remove or discipline a judge and to protect the bench and public from judicial misconduct or incapacity.¹⁴⁷

Only one judge has been impeached in Montana. In 1918 Charles L. Crum, judge of the Fifteenth Judicial District (then comprised of Rosebud and Musselshell counties) was found guilty of charges ranging from aiding his son to avoid the draft (although his son was not of draft age) to making statements critical of United States participation in World War I.¹⁴⁸ Crum was tried in absentia and no evidence was presented in his defense. The Senate judgment removed him from office despite the fact that he had resigned before the impeachment proceedings began.

The Crum affair illustrates other criticisms made of impeachment as a device for removal and discipline:

1. Political partisanship. The legislature is a partisan body and political considerations often dominate the disciplinary trial of a judge. The constitutional requirement that senators sitting in impeachment proceedings be upon oath or affirmation is aimed at reducing partisanship but has little effect.¹⁴⁹ For example, in the previously mentioned Ritter trial of 1936 there were fifty-six votes for conviction: fifty-one of them were from the opposite political party of the judge being tried.¹⁵⁰

2. Grounds for impeachment. Usually the grounds are limited to the more serious and flagrant offenses, such as Montana's "high crimes and misdemeanors, or malfeasance in office," and are not directed at more common types of judicial inadequacy, such as physical or mental disability or simple neglect.¹⁵¹ New York is an example of the opposite extreme; its Constitution does not specify any grounds for removal by impeachment so the grounds apparently are determined on a case-by-case basis.¹⁵²

3. Time-consuming and expensive. Modern legislatures lack time to depart from the complexity of their business for an impeachment trial.¹⁵³ Although Montana's 1918 trial ran only three days,¹⁵⁴ the trials usually are lengthy; trials of federal judges average sixteen to seventeen days and one trial ran for six weeks.¹⁵⁵ In one Oklahoma impeachment trial the cost was estimated at \$50,000; in Florida the average cost is \$250,000.¹⁵⁶

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4. Rights of the accused are inadequately protected. The size of the legislature makes it poorly suited for adjudicative functions;¹⁵⁷ in addition, members of the jury, the senators, are not required to be present each day of the trial.¹⁵⁸ As a result, the average attendance during federal impeachment trials has been fifteen senators a day; in one trial only three senators were seen present one day.¹⁵⁹ It is difficult to believe that the accused could receive a fair trial when so many of the jurors have not heard the entire evidence presented.

5. Harmful publicity. The rarity and notoriety of an impeachment trial produces an outpouring of publicity which jeopardizes the fairness of the trial and reflects adversely upon the entire judicial system.¹⁶⁰

6. Lack of confidentiality. Removal proceedings must have some method of confidential disclosure of facts concerning the judge which impeachment does not provide; thus, investigators have difficulty in gathering information to remove a judge.¹⁶¹

Arguments made in support of impeachment as a removal procedure include:

1. It is a vital safeguard against abuse of judicial power. Although rarely used, its existence serves to deter flagrant misuse of judicial authority.¹⁶²

2. It is a valuable supplement to the judiciary's power to remove its own members. If the judiciary is unable to discipline its own members, the responsibility is left to the legislature to perform this function.¹⁶³

3. Historically the legislature has not abused the power. Some assert that history has demonstrated that the legislature has not abused its disciplinary powers over the judiciary by initiating politically motivated removal proceedings. Other critics, however, point out that there have been politically motivated impeachments such as the attempt to impeach Justice Samuel Chase of the U.S. Supreme Court in 1804.¹⁶⁴

Another removal procedure provided for in the state constitutions is address, whereby the legislature, either by one or both houses, initiates the proceedings by sending a request for removal of a judicial officer to the governor, who is the removing authority.¹⁶⁵ An address usually requires a vote of two-thirds of the members elected to the legislature.¹⁶⁶ If

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not constitutionally required, the accused is entitled to notice and hearing by tradition because, like impeachment, address is a quasi-judicial proceeding.¹⁶⁷ Address is available in twenty-eight states: Arkansas, Connecticut, Delaware, Hawaii, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Nevada, New Hampshire, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Virginia, Washington, West Virginia and Wisconsin.¹⁶⁸

All the arguments made for and against impeachment as a procedure for removing judges are applicable to address, except one: the grounds for removal by address are usually broader than those for impeachment.¹⁶⁹ Although some state constitutions specify no grounds for removal, others either define it generally as "for reasonable cause"¹⁷⁰ or have limited it to specific acts, including mental and physical disability.¹⁷¹

Recall is another method of removal. It relies solely on the electorate; a certain percentage of voters sign a petition requesting the judge to submit to a special recall election.¹⁷² Some states provide that a judge who faces a recall election must run alone and receive a majority vote to retain office; other states allow opposition candidates to run.¹⁷³ In the latter situation, the judge need receive only a plurality to retain his office. Recall of judges is available in Arizona, California, Colorado, Kansas, Nevada, North Dakota, Oregon and Wisconsin.¹⁷⁴

Recall was adopted around 1910 by a number of Midwestern and far Western states when the Progressive and reform movements swept that part of the country.¹⁷⁵ This method was supposed to grant power to the people to remove corrupt and incompetent judges; in practice, however, it has seldom been used.¹⁷⁶ In California, the last recall election was in 1932.¹⁷⁷ Reasons for its disuse include (1) it is difficult and expensive to obtain the required percentage of signatures for recall elections;¹⁷⁸ (2) it depends upon voter dissatisfaction, which in turn depends on public information about judicial conduct which often is nonexistent;¹⁷⁹ (3) the persons most informed, lawyers, usually do not wish to campaign openly against a judge before whom they may later be forced to try cases;¹⁸⁰ (4) recall involves elections dominated by partisan political considerations rather than judicial qualifications and forces a judge to campaign for office rather than tend to judicial duties,¹⁸¹ and (5) many individuals who may be good judges are not necessarily adept politicians.¹⁸²

Courts

Courts are used in many states to determine measures of discipline or removal (see Table 15). In certain states the court is a specially constituted tribunal comprised of selected judges from the appellate and trial court levels. In others, the charges are heard before an existing court such as the supreme court in the manner of a bench trial. Usually only certain specified individuals may file complaints. The court may either dismiss the complaint or impose sanctions.

Special Courts.

In 1948 by constitutional amendment, New York created the Court on the Judiciary.¹⁸³ The court is composed of six judges, two from the highest appellate court and one member from each of the four divisions of the intermediate appellate courts. It can remove judges "for cause" and retire them "for mental or physical disability preventing proper performance of judicial duties."¹⁸⁴ The court's jurisdiction extends from members of the highest appellate court to courts of limited jurisdiction but does not include all judges within the state.¹⁸⁵ The court can be convened only by the chief judge of the Court of Appeals upon his own motion or by written request of the governor, a presiding justice of an appellate division or the executive committee of the state bar association.¹⁸⁶

The respondent judge is entitled to notice of the alleged charges and an opportunity to be heard. Concurrence of four of the six members of the court is necessary for removal or retirement. After it has convened, but prior to holding the hearing, the court must notify the governor, temporary president of the senate, and speaker of the assembly (house). If within thirty days after this notification the legislature commences removal proceedings against the judge, the court loses jurisdiction of the case.¹⁸⁷

One weakness in the New York court is that it has no continuous existence; it can be convened only upon application by certain individuals or groups. Since its creation in 1948, the court has convened only three times.¹⁸⁸ However, proponents of the plan insist that many complaints are handled on an informal basis and are not recorded.¹⁸⁹

Lack of continuous existence, critics charge, prevents maintenance of a permanent staff to investigate complaints of

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judicial conduct with any regularity. Also the rarity of hearings brings public attention when the court does meet. This prevents hearings on a confidential basis which would protect judges from adverse publicity if the charges are unfounded.¹⁹⁰

Further, critics complain, the court does not observe rules of fair procedure because it acts as both prosecutor and judge; in addition, membership on the court could include the judge who initially preferred the charges. Like impeachment, there is no route of appeal from the judgement of the court.¹⁹¹ Proponents of the court reply that a disciplinary proceeding is different from an ordinary criminal proceeding and to require separate prosecution, adjudication and appellate bodies would reduce the role of senior appellate judges, those best qualified to determine suitability for judicial office.¹⁹²

A basic advantage of the New York plan is economy. Use of an existing court rather than creation of a new agency reduces cost.¹⁹³ Furthermore, an impermanent existence costs less than a continuing body such as the California Commission, described below. Another advantage imputed to the plan is that senior appellate judges are best suited by training and experience to rule upon the conduct of fellow judges.¹⁹⁴ Unlike the California plan which employs individuals outside of judicial office, the Court on the Judiciary involves judges disciplining judges.

Despite criticisms, Delaware and Oklahoma have adopted variations of the New York court.¹⁹⁵ Oklahoma eliminated many of the drawbacks by creating two divisions--trial and appellate.¹⁹⁶ The appellate division reviews cases appealed from the trial division.¹⁹⁷ Judges from either division can be disqualified because of prejudice, interest or partiality.¹⁹⁸ In addition, membership of the court is not exclusively judges; a member of the state bar association is on each division.¹⁹⁹ The court is convened by petition filed by the supreme court, governor, attorney general, state bar association, or either house of the legislature.²⁰⁰ The grounds for removal are stated specifically in Oklahoma's Constitution and include gross neglect of duty, corruption in office, habitual drunkenness, and gross partiality or oppression in office.²⁰¹ Cause for compulsory retirement is "mental or physical disability preventing proper performance of official duty or incompetence to perform duties of the office."²⁰²

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Other courts. Many states use their state supreme courts (or highest appellate court) to act as a removal and disciplinary body which can remove, suspend or retire without petition from an outside source. The 1947 New Jersey Constitution authorized its supreme court to remove lower court judges "for such causes and in such manner as shall be provided by law."²⁰³ However, until 1970, the New Jersey legislature failed to pass legislation to implement this section; the 1970 law still falls short of providing adequate procedures.²⁰⁴ In the interim, the court discovered a method by which it could remove or discipline a judge indirectly. Since the court had authority to discipline attorneys licensed in the state, it held that judges might be disbarred or disciplined as members of the bar for judicial misconduct;²⁰⁵ thus, if a judge is disbarred, he is no longer qualified to hold judicial office. Theoretically, this disciplinary power exists in Montana also. As in New Jersey, the Montana Supreme Court has disciplinary power over members of the bar²⁰⁶ and supervisory control over inferior courts.²⁰⁷ Combining these powers and using New Jersey as precedent, the court should have authority to disbar judges. One reason this approach has not been used here may be that it depends heavily on centralized administration of the court system, which does not exist in Montana. The New Jersey court puts its court administrator in charge of investigations of complaints and when they are substantiated, the court then meets with the offending judge in an informal hearing.²⁰⁸ If the evidence warrants removal, the court may request the judge to resign or issue an order to show cause why disbarment proceedings should not be initiated.²⁰⁹ Another reason for the success of the New Jersey plan is strong, effective leadership by the state supreme court and its chief justice in the area of judicial behavior.²¹⁰ Wisconsin, which has a similar system, has failed to make headway because of a lack of leadership.²¹¹

Commissions

The commission plan, pioneered in California, is becoming the most accepted innovation in the area of judicial removal and discipline procedures. Twenty-two states--Alaska, Arizona, California, Colorado, Florida, Hawaii, Idaho, Illinois, Indiana, Louisiana, Maryland, Michigan, Missouri, Nebraska, New Mexico, Ohio, Oregon, Pennsylvania, Texas, Utah, Vermont and Virginia--and Puerto Rico have adopted this plan in some form.²¹² The system has fulfilled the most glaring deficiencies observed in all other methods previously discussed: it provides an effective means for a private citizen to seek relief against

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judicial incompetency, insures confidentiality necessary to protect the judicial function as a whole and creates an agency which is continually in operation.

Basically the commission plan requires an independent body, usually with a majority of its members being judges, to serve as a continuing investigatory agency with the authority to hold hearings on matters involving judicial fitness. This commission serves only as a recommending body; it cannot impose sanctions. It merely reports its decision to the state's highest appellate court which can follow the commission's recommendation, make its own determination, or dismiss the case.

The California plan consists of a Commission on Judicial Qualifications with jurisdiction over all state judges.²¹³ The commission is composed of nine members serving four-year terms: five judges appointed by the Supreme Court, two lawyers appointed by the state bar association and two citizens, who are not judges, retired judges or attorneys, appointed by the governor and approved by the senate.²¹⁴ The commission members choose an executive secretary who maintains a permanent staff headquartered in San Francisco.²¹⁵

Upon receipt of a complaint, the commission usually investigates informally to determine if the complaint is justified. Frivolous charges and those alleging matters outside of the commission's power are weeded out by the executive secretary. If the investigation substantiates the complaint, the commission considers the matter and may order further investigation, which usually is done by a letter to the judge, stating the allegations and requesting an explanation. If the explanation is satisfactory, the matter ends there; if the conduct complained of cannot be corrected by calling it to the judge's attention and the judge does not retire voluntarily in the meantime, then a formal hearing may be held. At the hearing the charges are presented and the judge has an opportunity to defend himself. Based on the findings at this hearing, the commission may recommend certain action to the supreme court or dismiss the charges.²¹⁶ The California Constitution authorizes the commission to recommend the following:

- (1) retire a judge for disability that seriously interferes with the performance of his duties and is or is likely to become permanent, and (2) censure or remove a judge for action occurring not more than six years prior to the commencement of his office, wilful and persistent failure to perform his duties, habitual intemperance, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute.²¹⁷

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If a recommendation is made, the supreme court reviews the case and makes final disposition of it. Until a recommendation is filed with the court, the commission's proceedings are by law kept in strict confidence.²¹⁸

In its first four years of existence the Commission received 344 complaints and directly caused the resignation or retirement of twenty-six judges.²¹⁹ Justice Bray, chairman of the commission during its first years of operation, stated four needs which the commission plan serves:

(1) The Commission recommends the removal or forced retirement of judges, who, for any reason, are no longer able to properly perform their official duties or have been guilty of misconduct.

(2) The very existence of the Commission with the powers given it acts as a deterrent to the occasional recalcitrant judge and minimizes absence from judicial duties for extended periods.

(3) The Commission provides a medium through which the disgruntled litigant, and even the crank, may air his grievances against the courts or judges without publicity affecting the particular judge singled out. In most instances the complaints are so groundless that we do not even notify the judge charged that a complaint against him has been made. In a sense, the Commission offers an apparently sympathetic shoulder upon which these complainants may cry. While they are never satisfied with our actions, nevertheless, you would be surprised to find how much more content they are than they would have been had there not been a public agency to give them consideration

(4) In quite a number of instances, these complaints disclose situations, which, while not serious enough to warrant the removal of the judge designated, nevertheless disclose practices [such as] continued failure to start court on time, taking unlimited recesses, constant wisecracking in court, short court hours, etc. In these instances, we notify the judge of the charge and tactfully suggest that if the practice complained of exists, it be discontinued.²²⁰

Variations of the plan range from having less than a nine-member commission to reporting the commission's decisions to the legislature, which, rather than the state supreme court, has the

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power to remove or discipline judges.²²¹ Some states use boards or councils to perform the commission's duties. Idaho's Judicial Council nominates candidates for judicial office under the merit selection plan and recommends disciplinary sanctions.²²² In Illinois a Courts Commission composed entirely of judges hears complaints referred by the Judicial Inquiry Board composed of judges, laymen and lawyers.²²³ The Illinois procedure combines aspects of both the commission plan the Court on the Judiciary plan.

Critics of the commission plan fear that an independent agency with its own staff authorized to hold confidential investigations may result in secretive Star Chamber proceedings.²²⁴ Although this is a possibility, defenders of the plan maintain that until charges are substantiated, the investigations should be kept in confidence and that safeguards exist to prevent abuse of the commission's authority through diversity of membership of the commission and the fact that the group merely recommends action to the court.²²⁵

Critics point out that the California commission regularly publishes the number of judges it has induced to resign or retire as if it were primarily concerned with that end and may use pressure to reach it.²²⁶ There also is fear that the commission may grow into another government bureaucracy with complex, expensive operations.²²⁷ However, in the first six years of operations in California, the annual budget of the commission including the salary of the executive secretary averaged only \$35,000.²²⁸ Members of the commission serve without salary, receiving only compensation for expenses.²²⁹

Proponents of the commission plan emphasize that an independent agency, relatively free of outside political pressure, insures the best procedure for handling the delicate task of supervising judicial conduct. Such an agency pinpoints responsibility, which is difficult in systems with divided responsibility such as New York's Court on the Judiciary.²³⁰ The continuous existence of the commission, through the availability of its staff at all times, allows development of uniform, statewide procedures and standards, which is a saving in both time and money over developing procedure and standards on a case-by-case basis.²³¹ Moreover, the commission plan is the only procedure which, through attorney and citizen members, actively involves individuals outside of judicial office. That satisfies critics who insist that if the judiciary alone is permitted to clean its own house, it will not clean at all. However, creating outside membership on the disciplinary group opens up a new and perhaps baseless argument: because the members are all appointed, there may be control of the judiciary by special interest groups.

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Basic Considerations

If a procedure of removal and discipline is to be incorporated into Montana's Constitution, either in place of impeachment or in addition to it, the following are basic considerations:

1. Should the constitutional provision create the machinery or should it merely describe the process required and leave implementation to the legislature? In Alaska the constitutional provision merely states:

The legislature may provide by law for a commission on judicial qualifications and establish procedures for the censure, suspension, disqualification or removal of a justice or judge of any court. [Art. IV, Sec. 10]

In California, two sections of Article VI, created the commission plan: in the first, the commission is established; in the second, the grounds for removal are enumerated and implementation as far as procedural rules is left to the state's judicial council.

Section 8: The Commission on Judicial Qualifications consists of two judges of courts of appeal, two judges of superior courts, and one judge of a municipal court, each appointed by the Supreme Court; two members of the State Bar who have practiced law in this State for 10 years, appointed by its governing body; and two citizens who are not judges, retired judges, or members of the State Bar, appointed by the Governor and approved by the Senate, a majority of the membership concurring. All terms are four years.

Commission membership terminates if a member ceases to hold the position that qualified him for appointment. A vacancy shall be filled by the appointing power for the remainder of the term.

Section 18. (a) A judge is disqualified from acting as a judge, without loss of salary, while there is pending (1) an indictment or an information charging him in the United States with a crime punishable as a felony under California or federal law, or (2) a recommendation to the Supreme Court by the Commission on Judicial Qualifications for his removal or retirement.

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(b) On recommendation of the Commission on Judicial Qualifications or on its own motion, the Supreme Court may suspend a judge from office without salary when in the United States he pleads guilty or no contest or is found guilty of a crime punishable as a felony under California or federal law or of any other crime that involves moral turpitude under that law. If his conviction is reversed suspension terminates, and he shall be paid his salary for the period of suspension. If he is suspended and his conviction becomes final the Supreme Court shall remove him from office.

(c) On recommendation of the Commission on Judicial Qualifications the Supreme Court may (1) retire a judge for disability that seriously interferes with the performance of his duties and is or is likely to become permanent, and (2) censure or remove a judge for action occurring not more than 6 years prior to the commencement of his current term that constitutes willful misconduct in office, willful and persistent failure to perform his duties, habitual intemperance, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

(d) A judge retired by the Supreme Courts shall be considered to have retired voluntarily. A judge removed by the Supreme Court is ineligible for judicial office and pending further order of the court he is suspended from practicing law in this State.

(e) The Judicial Council shall make rules implementing this section and providing for confidentiality of proceedings.

Colorado uses two sections to create the commission plan with almost inordinate detail. Not only are the terms of office for the first commission members specifically listed by date, similar to the provisions in Article VIII, Section 8 of the Montana Constitution (see Appendix A), but how members may be disqualified and how vacancies are filled are repetitively set forth.

By contrast in Utah and Hawaii the commission plan is created by legislation alone. The constitutional provision in Puerto Rico states:

Justices of the Supreme Court may be removed for causes and pursuant to the procedure established

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in Section 21 of Article III of this Constitution [the impeachment provision]. Judges of the other courts may be removed by the Supreme Court for the causes and pursuant to the procedure provided by law. [Art. V, Sec. 11]

Shorter provisions are exceptions rather than the rule. In order to prevent legislative tinkering with a system that the authors of the constitution feel should be adopted, most constitutions specify the machinery for removal and discipline, membership, terms of office for members, power of the disciplinary body and grounds for removal or discipline. Another rationale for the inclusion of these provisions is to prevent New Jersey's fate where the legislature failed to implement the constitution's removal provisions for 23 years.

States that have opted for the court-on-the-judiciary system have constitutional provisions of some length which create the court, its membership, powers, and procedural detail on jurisdiction of the court. Delaware, compared to New York and Oklahoma, has the most concise provision:

A Court on the Judiciary is hereby created consisting of the Chief Justice and the Associate Justices of the Supreme Court, the Chancellor, and the President Judge of the Superior Court.

Any judicial officer appointed by the Governor may be censured or removed or retired by the Court on the Judiciary as herein provided.

A judicial officer may be censured or removed by virtue of this section for willful misconduct in office, willful and persistent failure to perform his duties, the commission after appointment of an offense involving moral turpitude, or other persistent misconduct in violation of the Canons of Judicial Ethics as adopted by the Delaware Supreme Court from time to time.

A judicial officer may be retired by virtue of this section for permanent mental or physical disability interfering with the proper performance of the duties of his office.

No judicial officer shall be censured or removed or retired under this section unless he has been served with a written statement of the charges against him, or of the grounds of his retirement,

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and shall have had an opportunity to be heard in accordance with due process of law. The affirmative concurrence of not less than two-thirds of the members of the Court on the Judiciary shall be necessary for the censure or removal or retirement of a judicial officer. The Court on the Judiciary shall be convened for appropriate action upon the order of the Chief Justice, or upon the order of any other three members of the Court on the Judiciary. All hearings and other proceedings of the Court on the Judiciary shall be private, and all records except a final order of removal or retirement shall be confidential, unless the judicial officer involved shall otherwise request.

Upon an order of removal, the judicial officer shall thereby be removed from office, all of his authority, rights and privileges as a judicial officer shall cease from the date of the order, and a vacancy shall be deemed to exist as of that date. Upon an order of retirement, the judicial officer shall thereby be retired with such rights and privileges as may be provided by law for the disability retirement of a judicial officer, and a vacancy shall be deemed to exist as of the date of retirement.

In the absence or disqualification of a member of the Court on the Judiciary, the Chief Justice, or in his absence or disqualification the Senior Associate Justice, shall appoint a substitute member pro tempore.

The Court on the Judiciary shall have:

- (a) the power to summon witnesses to appear and testify under oath and to compel the production of books, papers and documents, and
- (b) the power to adopt rules establishing procedures for the investigation and trial of a judicial officer hereunder [Art. IV, Sec. 37].

2. Which governmental body should have the ultimate responsibility for removal and discipline? Traditional forms of removal have placed responsibility in the legislature. The trend in modern systems of removal and discipline is to put responsibility in the state's highest appellate court, or a court on the judiciary or in a commission. Where the

responsibility should be placed, who is best qualified to supervise judicial conduct and how responsibility should be centralized are questions directly related to centralized administration of the courts under a unified judicial system.

3. Should the grounds for removal and the sanctions to be imposed be enumerated? This problem related to the arguments under question "1" but warrants separate consideration. If the grounds for removal are restrictive, the removal and disciplinary process will be frustrated before it begins. For instance, if the grounds for removal are stated as "willful misconduct in office," a literal interpretation would prevent removing a judge who committed an act months before taking office which would have been grounds for removal if he had been in office at the time.

The trend in constitutional revision is to expand the grounds for discipline and removal. Most states have incorporated "mental or physical disability" as a basis for retirement or removal from office. However, adequate pension benefits are essential if this criterion is used. Usually formal involuntary retirement is unnecessary since preliminary investigation often is gently but sufficient persuasion to cause disabled judges to retire. "Excessive use of alcohol" is another consideration for disciplinary action especially when intoxication affects judicial performance in office, but may be extended to instances where excessive drinking public, although not directly affecting court work, may bring disrepute upon the judiciary and reduce public confidence.

Other bases for removal or discipline may include (1) dishonorable personal conduct: mishandling funds, tax evasion, improper political activities; (2) misbehavior in performance of duties: partiality, unfairness, discourtesy and unreasonable delay in obtaining decisions, prolonged personal absences from duties, or refusal to accept certain cases; (4) taking court time for business pursuits.²³²

In regard to sanctions, it was necessary to amend the California constitution in 1966 to provide the power to censure after its supreme court was confronted with a case which it felt did not warrant removal from office.²³³ Lacking the power to censure, the court dismissed the case even though there had been seven days of testimony by forty-eight witnesses and a commission finding of misconduct in thirteen separate legal proceedings.²³⁴ California's dilemma illustrates that there will be instances where forfeiture of

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judicial office would be too harsh and a public reprimand would suffice. Censure or suspension for a period of time without pay are two remedies that would fill the void.

If the sanctions and grounds for removal are not mentioned specifically in the constitution, who should be empowered to create them? Alternatives would be the legislature, the supreme court through its rule-making power, or the disciplinary body itself, such as the court on the judiciary or the commission.

4. Should all judges in the state be subject to the same removal and disciplinary procedures?

Most states provide separate removal procedures, one for supreme court personnel and another for other judicial officers. The Model Judicial Article proposed by the American Bar Association recommends the following section:

Justices of the Supreme Court shall be subject to removal by the impeachment process. All other judges and magistrates shall be subject to retirement for incapacity and to removal for cause by the Supreme Court after appropriate hearing.²³⁵

Obviously this method is employed when the Supreme Court is the disciplinary body; it prevents the Court from disciplining its own members. However, if a special court on the judiciary or an outside agency such as a commission is employed, it would not be necessary to have two removal procedures. Some states employing the commission plan--California, Illinois, Nebraska, New Mexico, Ohio, Oregon and Pennsylvania--extend the commission's jurisdiction to all judges in the state judicial system.²³⁶

RESTRICTIONS ON NON-JUDICIAL CONDUCT

State constitutions usually contain sections in their judicial articles restricting non-judicial activities. The objective of such sections is to remove possible conflicts of interest which would affect a judge's objectivity. Unlike other public officials, judges are expected to approach sainthood in their lifestyles. Plutarch spoke of Philip of Macedon who removed a judge for dying his hair and beard, saying, "I could not think that one that was faithless in his hair could be trusty in his deeds."²³⁷ Certainly restrictions on off-bench conduct have become less stringent since Plutarch's observations; however, the comportment of judges in their social, business

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and political activities is still carefully scrutinized by the public. The Carswell, Haynesworth and Fortas affairs illustrate public reactions when a judge's impartiality is questioned.

Restrictions on the conduct of judges in their private affairs are relevant to disciplinary and removal standards for conduct in the performance of judicial duties; however, disciplinary and removal provisions are more concerned with judicial competency while restrictions on judicial conduct are aimed at maintaining impartiality.

Questions facing the Convention may be whether restrictions on off-bench conduct should be placed in the constitution or left to legislation, rules of court, or regulations of another agency such as a removal commission? If restrictions are incorporated into the constitution, what should they include? Should these restrictions apply uniformly to all judicial officers? How will enforcement of these provisions be effectuated?

Article VIII of the Montana Constitution contains the following sections relevant to this discussion:

Section 30. No justice of the supreme court nor judge of the district court shall accept or receive any compensation, fee, allowance, mileage, prerequisite or emolument for or on account of his office, in any form whatever, except the salary provided by law.

Section 31. No justice or clerk of the supreme court, nor judge or clerk of any district court shall act or practice as an attorney or counsellor at law in any court of this state during his continuance in office.

Section 35. No justice of the supreme court or district judge shall hold any other public office while he remains in the office to which he has been elected or appointed.

Section 37. Any judicial officer who shall absent himself from the state for more than sixty consecutive days shall be deemed to have forfeited his office.

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The purpose of section 37 seems to be prevention of undue absenteeism which would hamper prompt administration of a judge's caseload. Yet indirectly, this forfeiture clause also may allay entanglements in non-judicial activities that would require extensive out-of-state participation. Except for the forfeiture provision, the aforementioned restrictions in the Montana Constitution do not apply to all judicial officers, only to supreme court and district court judges. Justices of the peace are exempted; they are prohibited by statute from practicing law in their own court or any other justice of the peace court in their township or county.²³⁸

In Montana, constitutionally proscribed conduct of higher court judges seems to focus on three areas: (1) practicing law as an attorney, (2) holding any other public office, and (3) receiving money or any other article of value for or on account of a judicial position. This latter restriction is contained in Section 30 which also prohibits receipt of allowance or mileage, yet supreme court and district court judges are allowed per diem and mileage by state statutes.²³⁹ Other legislation in Montana prohibits any higher court judge to have a partner practicing law, and prohibits a former judge to act as an attorney in any case over which he presided while in office.²⁴⁰ In addition, state statutes allow litigants to disqualify any supreme court justice, district judge or justice of the peace from acting in any proceeding because of interest in the litigation, relation by consanguinity or affinity within the sixth degree to either party, previous judgment in the litigation from which the appeal is being taken, previous involvement as an attorney for either party, and bias or prejudice which may prevent a fair and impartial hearing.²⁴¹

The Canons of Judicial Ethics, created by the American Bar Association, have been adopted by courts in many states as standards which serve as precept guides for the judiciary. Off-bench activities which the Canons disallow include partisan politics, business promotions and solicitations for charity; acceptance of gifts, favors and duties inconsistent with the judicial function; and abstention from private law practice and any judicial act in which personal interests are involved.²⁴² The judicial obligation is summarized in the Canons:

In every particular his conduct should be above reproach. He should be conscientious, studious, thorough, courteous, patient, punctual, just,

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impartial, fearless of public clamor, regardless of public praise, and indifferent to private political or partisan influences; he should administer justice according to law, and deal with his appointments as a public trust; he should not allow other affairs or his private interests to interfere with the prompt and proper performance of his judicial duties, nor should he administer the office for the purpose of advancing his personal ambitions or increasing his popularity [emphasis added].²⁴³

Recently created constitutional provisions in this area tend to incorporate prohibited activities in a blanket provision.²⁴⁴

Supreme court justices and superior court judges while holding office may not practice law, hold office in a political party, or hold any other office or position of profit under the United States, the State, or its political subdivisions. Any supreme court justice or superior court judge filing for another elective public office forfeits his judicial position. [Alaska Const. Art. IV, Sec. 14].

(a) The Supreme Court shall adopt rules of conduct for Judges and Associate Judges.

(b) Judges and Associate Judges shall devote full time to judicial duties. They shall not practice law, hold a position of profit, hold office under the United States or this State, or unit of local government or school district or in a political party. Service in the State militia or armed forces of the United States for periods of time permitted by rule of the Supreme Court shall not disqualify a person from serving as a Judge or Associate Judge. [Illinois Const. Art. VI, Sec. 13].

No justice or judge of a court of record shall, during his continuance in office, engage in the practice of law within or without the Commonwealth, or seek or accept any nonjudicial elective office, or hold any other office of public trust, or engage in any other incompatible activity. [Virginia Const. Art. VI, Sec. 11].

The disqualification statutes seem to be the most effective procedure existing in Montana to reduce judicial bias and prejudice.

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Unless voluntarily complied with, the present constitutional restrictions have little effect because there is no procedure now available by which to ascertain possible conflicts of interest. Judges are not required to disclose their off-bench activities. The Convention, then, may wish to follow the examples of Connecticut and Rhode Island where no constitutional mention is made of restrictions on non-judicial activity.²⁴⁵

TENURE, COMPENSATION AND RETIREMENT

Tenure

Tenure is the length of time a judge serves in office. There are two types: limited tenure (service for a specified length of time after which the judge must be re-elected or reappointed) and lifetime tenure. According to advocates of judicial reform lifetime tenure for appellate court judges is desirable. The issue of tenure, however, cannot be resolved by arbitrarily selecting a period of time; attention should be given to collateral issues directly related to determining a length of judicial service.

There is no ideal duration for judicial tenure. As a general principle, tenure should be long enough to safeguard the independence of the judiciary and to provide the stability of employment necessary to attract highly qualified personnel. Only when a judge is confident of his position for a reasonable long period of time can the people expect a successful lawyer to give up a lucrative practice to assume the bench On the other hand, it may be unwise to establish an indefinite period of judicial tenure. Judges, like other humans, sometimes fail to recognize their own limitations, desiring to continue serving the public long after their capacities have declined. More important, judicial tenure must be limited to give voice to the will of the electorate. Persons who do not perform their functions adequately must periodically be judged by the electorate.²⁴⁶

The Montana Constitution fixes the terms of office of supreme court justices as six years, district judges as four years and

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justice of the peace as two years.²⁴⁷ By statute, police judges serve two-year terms.²⁴⁸ The Convention may wish to consider whether these terms should remain the same, whether tenure of all judges should be stated in the constitution or whether tenure of minor court judges should be left to legislation. Most state constitutions and the federal constitution enumerate the tenure of appellate and trial court judges; state constitutions may fix terms of inferior court judges as well.

The question of tenure depends upon the method of judicial selection. Judges selected under the merit plan or elected to office serve limited terms in office. Appointed appellate judges frequently enjoy lifetime tenure. The issue of lifetime tenure vs. limited tenure usually revolves around appellate judgeships. As Table 16 indicates, the tenure of appellate judges in other states runs the gamut from one year in Vermont to life appointment in Massachusetts and Rhode Island. The federal judiciary also has lifetime tenure. New Hampshire and Puerto Rico have terms which last until the judge reaches 70 years of age.

Lifetime Tenure

The principal contention supporting lifetime tenure is that the mere possibility of a threat of interruption to a judge's career is sufficient to deter an ordinarily prudent man from being independent from the passions of the masses and whims of the majority.²⁴⁹ Proponents of lifetime tenure argue that:

[The federal supreme court] is probably history's most outstanding example of viability of a tribunal with the broadest powers of judicial review over the decrees of the legislative and executive branches. Yet, in all probability, the Court could not have attained the stature and prestige which it now enjoys if its members had been given only an appointment for a period of years²⁵⁰

Lifetime tenure therefore affords more impartiality on controversial questions and makes judicial service a more attractive career by offering greater job security.²⁵¹ It also allows judges to attain greater judicial skills through experience and enables a judge to perform at greater levels of his capacity using the experience he has acquired.²⁵² The primary disadvantage of such tenure is that unless a state has an

TABLE 16
TERMS OF JUDGES (In Years)

State	Appellate Courts		Major Trial Courts				Courts of Limited Jurisdiction			
	Of Last Resort	Inter Appellate	Chancery	Circuit	District	Superior	Other	Probate	County	Justice, Municipal or Police
Alabama	6	6		6				6	6	4 (a) 4b
Alaska	10					6				(a) 4c
Arizona	6	6				4				2 2d
Arkansas	8		6	4				2	2-4 6	6
California	12	12				5				6f, g
Colorado	10	8		6				6	4 (e)	
Connecticut	8					8		4		4d, f, h
Delaware	12		12			12			12	4 12d, i
Florida	6	6		6				4	2-4	4 4f, j, k
Georgia	5	6				4-8		4		4 4k 1-4l
Hawaii	10			10						4b
Idaho	6				4					2
Illinois	10	10						4		6n 4f
Indiana	6	4		4		4	4n	4	4	4 (a) 2c
Iowa	3								2	2
Kansas	6				4			2	2	4
Kentucky	8			5				4	4-8p	4 6-8f 6i
Louisiana	14	12			6o					4
Maine	7					7		4		7o
Maryland	15	15		15		Life	15q	4	4-10r	2 b, f, s
Massachusetts	Life							Life	Life	Life 6d 4b
Michigan	8	6		6			6t	6	6	2 4i
Minnesota	6				5			6	4	4
Mississippi	8		4	4				4	4	4
Missouri	12	12		6				4	2-4	4 4u
Montana	6				4				2	2 2v
Nebraska	6				6			4	6	6f

TABLE 16 (Continued)

State	Appellate Courts			Major Trial Courts			Courts of Limited Jurisdiction				
	Of Last Resort	Intermediate Appellate	Chancery	Circuit District	Superior	Other Probate	County	Justice, Municipal Magistrate	Pal	Police	Other
Nevada	6			4					4	2	
New Hampshire	To age 70			To age 70				To age 80			To age 70 ^b 5 ^{f,x}
New Jersey	7 with reappointment for life			7 with reappointment for life	5 ^w			3			
New Mexico	8	8		6				2 ^e			2 ^k
New York	14	5 ^y			14 ^z			10(ab)		4 ^{a,c}	10 ⁱ 6 ^b 9 ^m
North Carolina	8	8		8							4 ^b
North Dakota	10			6			4	4	4	4	6 ^f
Ohio	6	6			6 ^d		4	6	4		
Oklahoma	6	6		4				2 ^e			
Oregon	6	6		6			6	(a)	6		6 ^b
Pennsylvania	10	10			10 ^d			6 ^{ae}			
Puerto Rico	To age 70			12					4		8 ^b
Rhode Island	Life			Life			1 ^e		2		10 ^b
South Carolina	10			4			4	(e)	(af)		6 ⁱ
South Dakota	6			4			4	4	2a,2		
Tennessee	8	8	8	8	8 ⁿ		(ah)	(af)	4		8 ^{j,j}
Texas	6	6		4			4		4		4 ^{f,n}
Utah	10			6			6		4		6 ⁱ
Vermont	2				6 ^v		2		2		4 ^b
Virginia	12		8		8 ^{ak}		4	4			4-6 ^f
Washington	6	6		4				4	4		
West Virginia	12						6	(al)	(al)		6-8 ^{am}
Wisconsin	10				6 ^v			2			
Wyoming	8			6				(an)	4		

TABLE 16 (Continued)

- a) Judges of recorder courts in Alabama, magistrates in Alaska, police court judges in Iowa, and most municipal judges in Oregon at pleasure of appointing authority.
- b) District courts.
- c) For justices of the peace. Terms of city and town magistrates in Arizona provided by charter or ordinance.
- d) Courts of common pleas. In Arkansas, presided over by county judges in Missouri, by circuit judges.
- e) Dependent on municipal charters and ordinances in New Mexico and Oklahoma usually 2 years (or, in Oklahoma, at pleasure of appointing authority), in Rhode Island usually 1 year.
- f) Juvenile courts in New Jersey and Virginia, juvenile and domestic relations courts in Texas, also domestic relations courts. In Louisiana, juvenile court judges serve 6 years, except 3 in New Orleans.
- g) Superior courts.
- h) Circuit court.
- i) Family courts. In Rhode Island, judges serve during "good behavior."
- j) Courts of record. Escambia County court of record, 6 years.
- k) Small claims courts.
- l) Civil and criminal courts.
- m) Courts of claims.
- n) Criminal courts. In Tennessee also law-equity courts.
- o) Judges in New Orleans serve 12 years.
- p) Municipal and traffic court judges and city court judges in New Orleans serve 8 years other city court judges serve 6 years, except 4 years in Baton Rouge.
- q) Supreme Bench of Baltimore City.
- r) Also people's courts.
- s) Land Court of Massachusetts.
- t) Recorder's Court of Detroit.
- u) St. Louis Court of Criminal Correction.
- v) Justices of the peace, 2 years; police magistrates' terms correspond with terms of other elected city officials.
- w) County courts. In Vermont, 6 years for superior judges, 2 years for assistant judges. In New Jersey, judges have tenure on their third reappointment and after 10 years.
- x) County district courts.
- y) Justices are designated for five-year terms while retaining status as elected supreme court justices.
- z) Supreme court, to age 70. Judges may be certified thereafter for two year terms, up to age 76.
- aa) In New York City, 14.
- ab) In New York City, 10; outside New York City, determined by each city.
- ac) Town and village courts.

TABLE 16 (Continued)

- ad) Special district judges serve at pleasure of district judges by whom they are appointed.
- ae) Municipal court and traffic court of Philadelphia.
- af) Terms not uniform fixed by General Assembly.
- ag) Terms of justices and police magistrates, 2 years, county justices, appointed by circuit judges, at pleasure of court.
- ah) Six years for county chairmen, terms of county judges fixed by private acts.
- ai) Varies according to legislative act creating the court.
- aj) Courts of general sessions, domestic relations and juvenile courts if juvenile judge is designated by county court rather than elected, 6 years.
- ak) Corporation, hustings, law and equity courts, law and chancery courts.
- al) Municipal and police courts variable.
- am) Common pleas, domestic relations, criminal, intermediate and juvenile courts.
- an) Police justice's term the same as that of other appointive officers of the municipality.

Source: The Council of State Governments, State Court Systems, Report RM-446 (Lexington, Ky., Revised 1970), pp. 20-23.

efficient, working method of discipline and removal, incompetent, mediocre judges are frozen in office. To combine lifetime tenure and impeachment as the sole removal device may create a judiciary too firmly entrenched. The latter situation presents less of a problem on the federal level since those posts attract unusually capable men due to the status of the positions. There is also a substantial possibility that judges vested with life tenure may fail to respond to new and compelling needs of an ongoing, dynamic society.²⁵³

Limited Tenure

Limited tenure has the opposite effect of lifetime tenure. It makes possible the removal of judges who have not performed their duties well and prevents judges from remaining on the bench when advanced age may curtail their efficiency.²⁵⁴ Thus, the election of judges can serve as a method of removing incompetent judges. Conversely, limited tenure may interfere with judicial independence and impartiality. Elected judges are forced to forego judicial duties to campaign for re-election. Limited tenure also makes it difficult to attract qualified attorneys from successful private practice for a few years of security followed by the rigors and hazards of an election campaign.²⁵⁵

Most states require a judge to be reappointed or re-elected at the end of his term, depending on the method of judicial selection. A modification in this practice is to use a short probationary term. If the merit selection is used, the judge serves a probationary term of one to three years and is subject to electorate approval in a retention election in order to serve a longer second term. The length of the second term and each succeeding term can be a fixed period of time, six or ten years, or for life. In New Jersey a judge serves an initial seven-year term and upon reappointment serves for life.²⁵⁶ This approach has been endorsed by the National Municipal League in its Model State Constitution.²⁵⁷ Under the probationary-term system, the judge's record can be appraised and the electorate can decide whether he should continue in office. In Illinois, a yes-no retention election occurs every ten years for appellate judges and every six years for circuit court judges.²⁵⁸ The ABA Model Judicial Article provides for retention elections every ten years for all judges after serving a three-year-probationary term.²⁵⁹ A Michigan proposal provided for only one retention vote held three years after appointment and if a judge is retained, he holds office for life, subject to mandatory retirement at age 70 or disciplinary removal.²⁶⁰

COURT PERSONNEL

Compensation

Compensation is a major factor in attracting capable persons to the bench and in maintaining the independence and impartiality of judges while in office. Since the amount of judicial salaries is set by the legislature in federal and state systems, precautions were taken early in our history to prevent reprisals against unpopular judicial decisions by decreasing judicial compensation. The federal Constitution states:

The judges, both of the supreme and inferior courts, . . . shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office.²⁶¹

Unfortunately, some states provided, in addition to the diminution clause, that judicial compensation could not be increased during a judicial term. Article VII, Section 29 of the Montana Constitution originally stated:

The justice of the supreme court and the judges of the district courts shall each be paid quarterly by the state, a salary, which shall not be increased or diminished during the terms for which they shall have been respectively elected. Until otherwise provided by law, the salary of the justices of the supreme court shall be four thousand dollars per annum each, and the salary of the judges of the district courts shall be three thousand five hundred dollars per annum each (emphasis added).

Because of the staggered terms of judges on the supreme and district court levels, this prohibition against an increase of judicial salary while in office resulted in some judges receiving higher compensation than their colleagues.²⁶² The situation was remedied when an amendment adopted in 1964 deleted the underlined portion of the section cited above.²⁶³

Since it is not generally recommended that a constitution incorporate specific judicial salaries, the only questions regarding the compensation provision seem to be whether the prohibition against diminution of salary while in office should be retained and whether all judicial salaries should be paid by the state. A provision allowing judicial salaries to be set by the legislature with the proviso that such compensation shall not be diminished during continuance in office seems adequate. If the legislature were directed to pay all judicial salaries, this would be a step toward state assumption of judicial expenditures discussed in Chapter III.

COURT PERSONNEL

Although salaries of the supreme court and district court judges have been increased by each legislative session since 1967, Tables 17 and 18 indicate that Montana's salaries are relatively low when compared to the rest of the nation. Presently higher court salaries in Montana stand at \$22,500 for supreme court justices and \$20,500 for district court judges.²⁶⁴ On the lower court levels, 85 percent of the justices of the peace are compensated solely by fees.²⁶⁵ Salaried justices of the peace receive a maximum of \$5,500 annually.²⁶⁶ Annual salaries of police judges range from \$100 to \$10,800.²⁶⁷

Since the state already pays the compensation of supreme court and district court judges, whether it assumes the cost of compensating lower court judges depends on whether the present courts of limited jurisdiction are retained and whether the fee system of compensation is maintained. The question of whether the state should assume financing of all judicial salaries in Montana involves not only justices of the peace but police judges whose present compensation is set not by the legislature but by municipalities. Thus, the state would be entering an area which has been left to individual community dictates, allowing salaries of police judges to depend upon how much each community wishes to pay. This variance in salaries of police judges may result in a more efficient administration of justice in communities with higher paid judges than in communities with minimum compensation. The issues involved in this question were summarized in a report by the Advisory Commission on Intergovernmental Relations:

Two intergovernmental issues are involved in the establishment of adequate salaries. The first is the question of whether the State should mandate minimum salaries for those lower courts for which it does not now establish salaries. The second involves the matter of how much the States should aid localities in financing judicial salaries. Regarding the former, while no comprehensive data are available on the identity of these courts, they would usually include courts established at local governmental discretion, such as municipal, police, city or mayor's courts. The argument for State mandating is that it represents an exercise of State responsibility for seeing that the office is attractive enough to qualified persons and that a minimum standard of judicial performance is achieved statewide. The major argument against it is that the State should not mandate a requirement on local government unless it is prepared to help localities meet the concomitant cost. State mandating of

TABLE 17

COMPENSATION OF STATE APPELLATE AND MAJOR TRIAL COURT JUDGES, 1970

State	Appellate Courts		Major Trial Courts				
	Of Last Resort	Intermediate Appellate	Chancery	Circuit	District	Superior	Other
Alabama	\$22,500 ^a	\$22,000		\$15,000 ^a			
Alaska	28,000 ^b					\$26,500	
Arizona	23,500 ^a	22,500				21,500 ^c	
Arkansas	22,400 ^b		\$13,200 ^d	10,200 ^d			
California	40,724 ^{b,e}	38,170 ^e				31,816 ^{e,f}	
Colorado	27,500 ^b	23,750			\$20,000		
Connecticut	20,000 ^b					27,500	
Delaware	24,500 ^b		23,500 ^g			23,500 ^g	
Florida	34,000	31,200		28,500		30,000 ^d	
Georgia	32,500	32,500				21,000	
Hawaii	12,670 ^a			30,250			
Idaho	25,000				22,500		
Illinois	40,000	37,500		25,000-35,000 ^a			
Indiana	24,500 ^d	24,500 ^d		15,000-23,500 ^h		19,000-23,500 ^a	\$10,000-23,500 ^h
Iowa	24,000				21,000		
Kansas	23,500 ^b				19,500		
Kentucky	26,000			17,500 ⁱ			
Louisiana	37,500	35,000			20,000-33,500 ^a		
Maine	20,000 ^b					19,500	
Maryland	35,000 ^b	32,500 ^a		30,500			30,500 ^j
Massachusetts	33,800 ^b					30,000 ^g	
Michigan	35,000	32,500		20,000-30,000 ^a			30,000 ^k
Minnesota	26,000 ^b			22,000-23,500 ^a			
Mississippi	26,000 ^{b,c}		22,000 ^e	22,000 ^e			
Missouri	\$26,500	\$25,000		\$20,000-23,000 ^a			
★ Montana	21,000 ^b				\$19,000		
Nebraska	25,000				22,000-23,500 ^a		
Nevada	28,000				24,000		
New Hampshire	27,500 ^b					\$26,000 ^g	
New Jersey	45,000 ^b	42,000				37,000 ^m	\$37,000 ⁿ
New Mexico	22,500	21,000			20,000		
New York	47,838 ^{b,o}	37,483-45,521 ^{a,o}					35,333-40,833 ^{a,p}
North Carolina	29,000 ^b	26,000 ^q				22,000 ^r	
North Dakota	29,000				18,000		
Ohio	30,000 ^b	28,000					14,500-26,000 ^q
Oklahoma	25,000	19,500			12,500-17,500 ^r		
Oregon	26,000	25,000 ^{f,s}		24,000			
Pennsylvania	37,500 ^b	34,500 ^{f,s}					26,500-32,500 ^{r,q}
Puerto Rico	27,000 ^b					22,900	
Rhode Island	25,000 ^b					23,000	
South Carolina	26,500 ^{b,t}			24,500			
South Dakota	20,500			18,500			
Tennessee	24,000 ^d	20,000 ^r	\$17,500	17,500			17,500 ^h
Texas	20,000	26,000			20,000-29,000 ^a		
Utah	20,000 ^b				17,500		
Vermont	25,000						22,000 ^{g,n}
Virginia	31,000 ^{b,u}		22,000 ^v	22,000 ^v			22,000 ^{v,w}
Washington	27,500	25,000				22,500	
West Virginia	27,500			17,500-25,000 ^a			
Wisconsin	24,000 ^b			20,000-28,000 ^a			17,000-27,000 ^{a,n}
Wyoming	15,000				18,500		

TABLE 17 (Continued)

Supplementation for shown in court for amount received by addition even though it may not be above the effect.

- d) Salaries may be supplemented by counties (in Missouri, also by the city of St. Louis). In Louisiana, judges, immediately, County, district, Texas and Wisconsin the lower amount of the range for the salary paid by the State. In Georgia the state salary of \$20,000 is supplemented by circuit, in accordance with legislative determination, by \$1,000 to \$2,000, and \$12,000 in Fulton County (Atlanta). In Illinois, circuit court judges receive a state salary of \$27,500, supplemented by \$7,500 by the county in Cook County (Chicago) associate judges of the circuit court receive a salary of \$25,000, supplemented by \$7,500 in Cook County lawyer magistrates receive a state salary of \$10,500, supplemented by \$4,500 in Cook County non-lawyer magistrates receive \$15,000 from the State. In Indiana, the State pays a fixed amount; supplements are based on a population sliding scale in addition, county commissioners may increase a judge's salary not to exceed \$4,000. In Louisiana, local supplementation, up to \$13,500, is mandatory in some instances, permissive in others. In Minnesota, the supplement is \$1,500 in counties with a population of 20,000 or more. In Missouri, a \$3,000 supplement is compulsory in two counties in other instances optional supplements range from \$1,800 to \$3,600. In Nebraska, Lancaster (Lincoln) and Douglas (Omaha) Counties are required to pay a supplement of \$1,500. In Texas, numerous special legislative acts provide for local supplementation up to \$2,000 -- in some instances optional, in others mandatory -- not necessarily keyed to region or population. In West Virginia, the State pays \$17,500 to \$17,000 county supplements may not exceed \$25,000 in the aggregate.
- e) These jurisdictions pay additional amounts to the chief justices of the courts of last resort. The additional sums are \$500 in Colorado, Delaware, North Dakota, Pennsylvania, Puerto Rico, South Carolina and Utah \$1,000 in Kansas, Maryland, Minnesota, Mississippi, New Hampshire, North Carolina, Rhode Island, Tennessee, and Wisconsin \$1,200 in Massachusetts \$1,210 in Hawaii \$1,500 in Maine, Montana, Vermont and Virginia \$2,000 in Alaska and Ohio \$2,500 in Arkansas and New Jersey \$2,545 in California \$2,688 in New York \$4,000 in Connecticut (also for Chief Court Administrator).
- f) Half paid by State half by county.
- g) In addition, expense allowance of \$2,400 in Arkansas and Indiana \$4,800 in Georgia and \$5,000 in North Carolina. In Arkansas, judges may elect instead to receive actual expenses incurred.
- h) Effective September 1, 1970, salaries shall be increased every year by the percentage by which the California consumer price index, compiled by the California Department of Industrial Relations, increased in the previous calendar year.
- i) Salaries paid partially by State, partially by county, based on statutory population formula where by the State pays a larger portion in the less populated counties.
- j) Presiding judges of these courts receive an additional \$500 in Delaware Mississippi, New Hampshire, Pennsylvania and Vermont \$538 in New York \$1,000 in Maryland, North Carolina Rhode Island and Tennessee \$1,300 in Massachusetts.
- k) Criminal courts. In Tennessee also law equity courts.
- l) Regular circuit judges are ex officio special commissioners of the court of appeals and in that capacity receive an additional \$2,400.
- m) Supreme Bench of Baltimore City.
- n) Recorder's Court of Detroit.
- o) In addition, judges receive full reimbursement for all travel expenses on official business.
- p) Assignment judges, \$40,000.
- q) County courts.
- r) In addition, judges of the court of appeals receive \$6,000 for expenses, those of the appellate division (3rd and 4th departments) \$8,000 (\$9,000 for presiding judge), and those of the supreme court (3rd and 4th departments) \$3,000. Judges are due to lower salaries paid to judges in 3rd and 4th departments. \$10,500 of salaries of judges in the latter and \$16,000 in 1st and 2nd departments paid from local sources.
- s) Supreme court.
- t) Courts of common pleas. Variations in salary based on population. In Ohio, State pays \$11,000, county an additional per capita salary -- minimum \$3,500 maximum \$15,000. In Pennsylvania, judges in districts with a population of more than 150,000 receive \$30,000, those where the population is between 100,000 and 150,000 receive \$27,500, and where the population is below 100,000, \$26,500, judges of the commonwealth court (Dauphin County) receive \$32,500.
- u) \$17,500 for district judges. Associate district judges in counties of less than 10,000 population receive \$12,500 in counties of 10,000 to 300,000 population, \$14,500 in counties of 300,000 or more, \$16,500. Special judges, who may be appointed by district judges, receive \$12,500 if they are lawyers, \$8,500 if they are non-lawyers. Constitution provides that county supplements may be authorized by statute no such authorization has been given above salaries are paid by State.
- v) \$35,500 for judges of superior court \$34,500 for judges of commonwealth court.
- w) Plus \$600 a year for office expenses, and \$25 a day for subsistence while court is sitting in Columbia (average 40 days a year).
- x) Plus \$2,000 travel expense in lieu of per diem.
- y) Salaries shown are those paid by State may be supplemented by localities.
- z) Corporation, business, and law and equity courts.

****In Montana 1971 salaries are \$24,000 for chief justice of the supreme court, \$22,500 for associate justices of the supreme court and \$20,500 for district court judges.**

Source: The Council of State Governments, State Court Systems, Report RM-446 (Lexington, Ky., Revised 1970), pp. 24-27.

TABLE 18

COMPENSATION OF JUDGES OF COURTS OF LIMITED JURISDICTION

State	Probate	County	Municipal	Justice, Magistrate or Police	Other
Alabama	Fees or salary	Fees or salary		Fees	(a)
Alaska				\$600-12,000 ^b	\$19,000 ^c
Arizona				Up to 14,000 ^d	
				Up to 23,280 ^e	
Arkansas		\$1,800-5,000	\$2,400-15,000	Fees ^f	100-900 ^g
California	\$20,000		20,270 ^h	200-21,000 ⁱ	
Colorado		1,600-17,500 ^j	(k)		20,000 ^{l,m}
Connecticut	Fees				20,000 ^l 21,500 ⁿ 22,500 ^o
Delaware			12,000-25,000 ^p	3,000	9,500-21,000 ^q 17,500 ^r 21,000 ^p
Florida		0,500-22,500	Up to 18,500	Fees, or 600-12,000 ^d	Fees, or 600-23,000 ^q
				0,600-21,000 ^r	3,000-28,500 ^l 15,000-28,500 ⁿ
Georgia	Fees & salary			Fees & salary	Fees ^q 25,000 ^o
Hawaii					5,324-23,670 ^s
Idaho	1,500-14,500 ^t		300-11,300 ^u	Salary ^u	
Illinois					6,500 ^v
Indiana	12,000-23,500		19,500 ^w	3,000-4,000 (part-time)	12,000-23,500 ^l
Iowa			(x)	Fees & salary ^y	
Kansas	5,000-15,000		Up to 12,500	Fees & salary	
Kentucky		Up to 9,600			
Louisiana			Up to 28,000 ^z	Fees	20,000-33,500 ^{l,p}
Maine	3,200-8,000				15,000 ^c
Maryland	8-19.5 a day ^{an}		4,000-25,000 ^{ab}	300-6,500	
Massachusetts	9,400-26,300 ^{ac}		25,000 ^{ad}		30,000 ^{ae} 22,000-26,300 ^l
					7,600-25,000 ^c
Michigan	6,500-29,000 ^{af}		5,000-16,000		25,000 ^g 13,000-27,500 ^c
Minnesota	7,500-22,000 ^{ag}		24-23,000 ^{ag}	Fees	
Mississippi		5,400-23,000 ^{ah}	Salary ^{ai}	Fees ^d	18,500 ^p
Missouri	10,000-24,000 ^{aj}		Varies	10,500-17,400 ^{ak}	21,000 ^l
Montana			3,000	Up to 3,600 & fees ^d	
				Up to 4,200 & fees ^y	

TABLE 18 (Continued)

State	Probate	County	Municipal	Justice of the Peace or Police	Other
Nebraska		\$4,000-19,500 ^{am}	Up to \$19,000 ^{an}	Fees & salary ^{ao}	\$22,000-23,500 ^l
Nevada			from \$300 plus \$5.00 per case up to \$19,000 ^k	\$300-15,000 ^d	
New Hampshire	\$9,000 ^{ap}		(u)		1,050-18,000 ^c
New Jersey		34,000 ^{aq}	Up to 17,500 ^{ar}		34,000 ^l
New Mexico	500-3,960		(u)	2,000-14,000	8,000 ^h
New York ^{as}	25,000-40,833 ^{at}	25,000-36,000	Up to 30,000	Up to 25,000 ^{au}	35,333 ^v 25,500-30,000 ^c
North Carolina					25,000-36,000 ^p
North Dakota	5,600-8,500 ^{av}	11,000-13,500 ^{am}	Salary as agreed	Up to 5,000	17,000 ^c
Ohio		3,000-8,000 ^{aw}	10,000-23,000 ^{am}	2,000 ^y	
Oklahoma			Varies		26,000 ^l
Oregon		3,000-11,040 ^b	Up to 20,172 ^b	Up to 8,400 ^b	18,000 ^c
Pennsylvania			16,500-20,000 ^{ax}	3,000-14,000 ^{ay}	16,500-20,000 ^{ax}
Puerto Rico				3,000-4,800 ^{az}	17,000 ^c
Rhode Island	200-11,440			5,075 ^y	20,000 ^c 23,000 ^p
South Carolina	Varies ^k	6,000-10,000	Varies ^k	500-3,000	Varies ^{k,p}
South Dakota		16,500	16,500 ^k	Fees	
Tennessee		Salary	Varies ^k		Up to 10,000 ^{ba} 15,000 ^{bb}
Texas	6,000-19,000	6,000-18,000 ^{hc}			Varies ^{k,l}
Utah			3,200-9,000	Up to 12,000	Up to 20,000 ^l
Vermont	2,650-10,500 & Fees			Fees	12,500 ^c
Virginia ^b		3,000-15,000	Up to 22,500 ^{bd}	Fees	19,000
Washington			Up to 22,248 ^{bm}		3,000-17,500 ^l
West Virginia		540-9,600	1,200-8,000 ^{bn}	Fees or salary, up to 20,000 ^d	
Wisconsin			Salary ^u	Fees ^{bu}	18,500-17,500 ^{bf}
Wyoming			Salary	1,600-4,800 ^d	

- a) Recorder courts, salary, fixed by city commissions, varies from town to town.
- b) Ranges due to region and population served.
- c) District courts. In Maine, North Carolina and Rhode Island, chief judges receive additional \$1,000 in Massachusetts, additional \$1,300; in New York, additional \$2,500. In Hawaii, full-time magistrates receive \$23,670, part-time magistrates \$5,324-8,318 (per diem). In Massachusetts, full-time justices receive \$25,000; part-time justices, lesser amounts but are permitted to practice; special justices are paid on a per diem basis. In Michigan, State pays \$18,000; counties may supplement by up to \$9,500. In New Hampshire, salary is based on population of the district. In New York, district court judges in Nassau County receive \$30,000 in Suffolk County \$22,500; president judges receive an additional \$2,500.
- d) Justices of the peace. In Arizona, their salaries depend on the number of registered voters; in Washington and Wyoming, on population.
- e) City and town magistrates.
- f) Doty, Justice of the Peace v. Goodwin 246 Ark.149 held that a person charged with a misdemeanor is unconstitutionally deprived of due process of law by being subject to trial before a justice of the peace, who receives fees and costs only when the accused is convicted.
- g) Common pleas courts. In Arkansas, salary listed is additional for county judge who presides over common pleas court.
- h) Salary set by State, paid by county. Effective September 1, 1970, salary shall be increased every year by the percentage by which the California consumer price index, compiled by the California Department of Industrial Relations, increased in the previous calendar year.
- i) May continue private practice.
- j) Depending on county classification, which is based primarily on population, but caseload also is a factor.
- k) Depending on municipal charters and ordinances or other local determination.
- l) Juvenile courts; in New Jersey and Virginia, juvenile and domestic relations courts; in Texas, also domestic relations courts. In Ohio, total salary of judges of Juvenile Court of Cuyahoga County paid by county.
- m) Superior courts.
- n) Circuit court. Chief judge receives \$23,500.
- o) \$12,000 fee for part-time services by judges who may continue private practice. \$25,000 for a full-time judge, added to the City of Wilmington by recent enactment.
- p) Family courts. Mississippi salary for any class I county with 80,000 or more population.
- q) Small claims courts.
- r) Magistrate courts.
- s) Civil and criminal courts of record. In Georgia, \$25,500 for judges of criminal court of Fulton County; \$24,000 for judges of civil court of Fulton County, plus \$500 for chief judge.
- t) On January 11, 1971, these courts will be replaced by a magistrate's division of the district court. Salaries will be paid on qualification, experience, ability and location.

TABLE 18 (Continued)

- u) Salaries of municipal judges fixed by ordinance of governing board. In Idaho, those of judges of justice courts fixed by board of county commissioners, with approval of senior district judge.
- v) Courts of claims. In New York, plus \$6,000 expense allowance (\$9,000 for presiding judge).
- w) Presiding judge receives \$21,000.
- x) Salary is 80 percent of district judge's salary.
- y) Justices of police courts. In Iowa, if mayor holds mayor's court, generally receives, in addition to his salary, the same fees as a justice of the peace.
- z) City court judges in New Orleans receive \$28,500; municipal and welfare court judges in New Orleans receive \$18,000.
- aa) Several counties and Baltimore City now pay annual salaries ranging from \$600 to \$14,000. The chief judge of the Orphan's Court of Baltimore City receives an additional \$500 (total \$14,500).
- ab) Chief judges of municipal and people's courts of Baltimore City and people's courts of Montgomery County receive an additional \$500 (total \$25,500) chief judge of people's court of Prince George's County receives additional \$1,000 (total \$22,000) chief judges of two other people's courts receive additional \$500 (total \$4,500-\$12,500).
- ac) Chief judge receives an additional \$1,000.
- ad) Municipal Court of Boston. Chief justice receives additional \$1,300.
- ae) Land Court of Massachusetts.
- af) Salary set by Legislature, paid half by State, half by county; county may supplement.
- ag) Fixed by Legislature for various counties in accordance with population. Extra \$1,000 to \$2,000 for probate judges in counties without municipal court; amount based on number of cases handled during year.
- ah) Salaries (lower end of range part time), as fixed by State, vary by class of county according to assessed valuation and population. Certain class 1 counties may supplement by up to \$4,000.
- ai) Salaries of police court justices fixed by municipal authorities; in Mississippi, usually vary according to size of city.
- aj) \$24,000 paid in St. Louis City, St. Louis and Jackson Counties. Other probate judges receive up to \$23,000.
- ak) Magistrates. In counties of 30,000 and less, probate judge is ex officio magistrate and salary of magistrate compensates for both offices.
- al) St. Louis Court of Criminal Correction. \$9,000 paid by State \$12,000 by city.
- am) Based on population. In North Dakota, the salary is \$11,000 in counties having a population not exceeding 15,000 \$13,500 if population is 15,000-22,000 \$15,000 if population is over 22,000. In Ohio, part-time judges receive a minimum of \$6,000. In Washington, top salary paid in Seattle.
- an) \$19,000 in metropolitan and primary class cities; in first-class cities, salaries set by city councils.
- ao) Fees for justices of the peace, salaries of police magistrates set by city councils.
- ap) Additional compensation for special sessions.
- aq) County district courts.
- ar) Top of range applicable to Newark. Presiding judge there receives an additional \$2,500.
- as) Ranges due to local determination or optional local supplements.
- at) Surrogates' courts. Statutory minimum of \$25,000 may be supplemented by localities.
- au) Town and village courts.
- av) County courts which function as probate courts, \$5,600 in counties having a population not exceeding 8,000. \$5,800 if population exceeds 8,000 (additional \$100 for each additional 1,000 population, but not to exceed \$7,000). \$8,500 if population in excess of 30,000.
- aw) Minimum \$3,000, plus 6¢ per capita of population of district, not exceeding \$6,000. An additional \$2,000 may be authorized by legislative body of county.
- ax) Municipal court and traffic court of Philadelphia. Lawyer judges receive \$20,000, non-lawyer judges, \$16,500.
- ay) Justices of the peace minimum \$3,000, plus 40¢ per resident within district, up to \$14,000.
- az) Salary depends upon length of service, with \$300 increment for each two years of service for justices of the peace.
- ba) Courts of general sessions.
- bb) Domestic relations courts.
- bc) In Dallas and Harris Counties (Houston) - population between 900,000 and 1.2 million - \$18,000 plus \$3,000 as member of county juvenile board. County courts at law and county criminal courts, up to \$17,500.
- bd) Including supplements to state salary which may be paid to municipal court judges.
- be) Municipal or police court tries misdemeanors in city terms interchangeable. If judge, salary if mayor, no extra money.
- bf) Common pleas, domestic relations, intermediate, juvenile and criminal courts.

Source: The Council of State Governments, State Court Systems, Report RM-446 (Lexington Ky., Revised 1970), pp. 28-32.

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local expenditures without State financial assistance long has been one of the sorest points in State-local relations.

This leads to the second intergovernmental issue: To what extent should the State legislature assist the localities in meeting the salary costs of local judges? The Institute for Judicial Administration found that in at least 23 States, lower courts were financed entirely by local funds. In at least nine more States, the cost was shared by State and local governments.

The State of New York provides one example of State financial assistance to local units of government in meeting the costs of a mandatory requirement on the courts. A 1961 constitutional amendment mandated full-time service by judges of a court for the City of New York, of the family court, the surrogate's court and county court, as well as of the higher courts, elected or appointed after September 1, 1962. A 1962 statute provided minimum salaries for judges of the surrogate's, county, and family courts if they were full-time judges by virtue of the constitutional provision. The same statute made State aid available to counties with such full-time judges and to the City of New York to be administered by the Administrative Board of the Judicial Conference.

The statute offers State aid to counties of 300,000 or more population and the City of New York at the rate of \$10,000 per year for each full-time judge of the county court, surrogate's court, family court and civil and criminal court of New York City. In counties of less than 40,000 population, the maximum State aid is \$10,000 per year, in counties of 40,000 to 100,000 population the maximum is \$20,000 per year, and in counties of 100,000 to 300,000 population the ceiling is \$30,000 per annum. In no case can State aid exceed \$10,000 per year for each full-time judge of the county court, surrogate's court and family court.

For fiscal year 1967-68, a total of \$3,421,779 was paid, of which \$2,099,287 went to New York City, \$98,027 to Nassau County, and lesser amounts down to a minimum of \$10,000 to other counties.²⁶⁸

The Executive Director of the American Judicature Society has stated that "the greatest current weakness in judicial compensation picture is the deplorable neglect of the courts of limited and

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special jurisdiction."²⁶⁹ One judge complained to the Society that all attention and efforts of judicial reform in his state were centered on higher court judges, and county level courts were ignored as if they were not a part of the judicial system.²⁷⁰ In 1968 the Society recommended that a minimum trial level salary of \$17,000 and noted that a minimum trial level salary of \$17,000 and noted that approximately half of fifty-six courts of limited jurisdiction in forty-three states surveyed in 1968 did not meet this minimum for any of their judges.²⁷¹

The problem of adequate compensation is legislative, not constitutional. Thus far, California offers the most progressive solution; state statutes there allow judicial salaries to be increased annually by the percentage by which the state's consumer price index increased in the previous calendar year.²⁷² However, the question of how judicial salaries are financed may depend upon the compensation provision of the judicial article. State-local sharing of costs seems to be the trend. New York already has taken this step. The National Municipal League suggests the following language in its model judicial article:

The chief judge shall submit an annual consolidated budget for the entire unified judicial system and the total cost of the system shall be paid by the state. The legislature may provide by law for the reimbursement to the state of appropriate portions of such cost by political subdivisions.²⁷³

Illinois' new judicial article contains a similar approach:

Judges shall receive salaries provided by law which shall not be diminished to take effect during their terms of office. All salaries and such expenses as may be provided by law shall be paid by the State, except that Appellate, Circuit and Associate Judges shall receive such additional compensation from counties within their district or circuit as may be provided by law. There shall be no fee officers in the judicial system. [Art. VI, Sec. 14]

The ABA model judicial article concentrates more on the question of adequate salaries than the method of financing. It states:

The salaries of justices, judges, and magistrates shall be fixed by statute, but the salaries of the justices and judges shall not be less than the

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highest salary paid to an officer of the executive branch of the State government other than the governor.²⁷⁴

Thus, the Convention will be faced with various issues in regard to compensation: adequacy of salaries, the diminution clause and method of financing judicial compensation.

Retirement

Along with tenure and compensation, retirement pension plans are considered by potential candidates to the bench in determining the attractiveness of the position. In Montana pension provisions for supreme court and district court judges were enacted by the legislature in 1967.²⁷⁵ The judge's program is administered in the same fashion as the public employees' retirement system to which lower court judges may belong. Under the judges retirement system, each member is required to contribute 6 percent of his monthly salary; this is matched by the state in an equal amount.²⁷⁶ These appropriations and contributions are paid into the public employees' retirement system but earmarked as the judges' retirement fund.²⁷⁷ In addition, one-fourth of certain fees collected by the county treasurers and the supreme court clerk, as designated by the legislature, are credited to the judges' retirement fund.²⁷⁸ The right to receive the retirement allowance vests when a member reaches 65 years of age and has completed at least five years of service.²⁷⁹ The member may retire at age 65 but must retire at age 70 in order to receive pensions benefits.²⁸⁰ The usual retirement allowance consists of the state annuity plus the member's annuity. The member's annuity is the actuarial equivalent of his aggregate contributions at the time of retirement; the state annuity is an amount which, when added to the member's annuity, provides a total retirement allowance of 3 1/3 percent per year of his final salary for the first fifteen years' of service and 1 percent for each year's service thereafter.²⁸¹ In addition, there are specific allowances for disability, involuntary retirement, penalty retirement and optional retirement.²⁸² Since an adequate pension program is already in existence in Montana through legislation, it may be superfluous to constitutionally require the legislature to maintain a pension program for judges. The retirement of judges, however, has constitutional import because of its relation to the removal and discipline of the judiciary previously discussed in this chapter.

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Most modern removal provisions in state constitutions include involuntary retirement of judges who are physically or mentally incapacitated because of advanced age. State constitutions employing a court on the judiciary, such as New York, Delaware and Oklahoma, usually empower the court to retire a judge "for permanent mental or physical disability interfering with the proper performance of the duties of his office."²⁸³ Those states which use an independent commission for removal and discipline have constitutional or statutory provisions allowing the commission to recommend retirement of a judge to the supreme court for "disability that seriously interferes with the performance of his duties and is or is likely to become permanent."²⁸⁴ In other states the supreme court or some other body may initiate retirement procedures by certifying apparent incapacity to the governor who appoints a special commission to conduct an inquiry. In Oregon the bar association can initiate such proceedings; Minnesota by statute authorizes twenty-five or more freeholders to petition the governor for removal of a judge incapacitated for more than six months, and in New Jersey the supreme court certifies incapacity to the governor.²⁸⁵ The model judicial article proposed by the American Bar Association follows the commission approach:

A justice of the Supreme Court may be retired after appropriate hearing, upon certification to the governor, by the Judicial Nominating Commission for the Supreme Court that such justice is so incapacitated as to be unable to carry on his duties.²⁸⁶

The ABA committee's comment which accompanied this section stated:

This provision follows the Alaska plan to have an independent body make the determination whether a high court judge has become incapacitated while in office. The nominating commission seems to be a logical agency to charge with this responsibility. The difficulties which seem to arise when this power is put in the hands of fellow judges are avoided by this approach.

In addition to the involuntary retirement provisions incorporated into removal and disciplinary procedures, some state constitutions have separate sections dealing with a mandatory retirement age and post-retirement service for judges.

Mandatory Retirement.

More than a decade ago, the National Conference on Judicial Selection and Court Administration recommended automatic

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retirement at 70.²⁸⁷ The President's Commission on Law Enforcement and Administration of Justice endorsed the principle of retiring judges at a predetermined age.²⁸⁸

The Advisory Commission on Intergovernmental Relations reported that at least twenty-three states by either statutory or constitutional mandate require retirement usually at age 70.²⁸⁹ The constitutions of Alaska, New York, Maryland and Florida require retirement at age 70,²⁹⁰ while in Colorado's judicial article the mandatory age of retirement is 72.²⁹¹ Iowa leaves the problem of mandatory retirement age to the legislature by a constitutional provision which states:

The General Assembly shall prescribe mandatory retirement for Judges of the Supreme Court and District Court as a specified age and shall provide for adequate retirement compensation [Art. V, Sec. 18]

Determination of whether a mandatory retirement age should be incorporated into the judicial article must be resolved by the Convention. If a judge wishes to receive pension benefits in Montana, legislation establishing the judges' retirement system requires the judge to retire at age 70:

Any judge or justice who becomes eligible for retirement hereunder, but fails to make application therefor, prior to his attaining the age of 70 years, shall automatically waive all retirement benefits, and shall receive a return of only such moneys equal to the accumulated deduction contributed by him; save and except that any judge or justice, who is over the age of 70 years, at the time of the effective date of this act, or who shall attain such age before the expiration of his term, without forfeiting said retirement. At the termination of the said existing term, if such member has failed to make application for retirement under this act, he shall automatically waive all retirement benefits hereunder, and shall receive a return of only such moneys equal to the accumulated deduction contributed by him.²⁹²

This provision, however, applies only to supreme and district court judges.

Arguments for mandatory retirement. The problem is balancing the need for removing judges who may become incompetent be-

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cause of age with the need to retain the services of judges who remain productive. Proponents of a mandatory retirement age argue that it eliminates the unpleasantness of removing aging judges on an individual basis, which is more personal than the objectivity of mandatory retirement.²⁹³ They argue that the increase in the volume of judicial business, the growing complexity of most judicial positions and the marked change in the law require retirement at a fixed date.²⁹⁴ Furthermore, the emotional blow of mandatory retirement is offset by provisions allowing part-time post-retirement service, which also substantially increases judicial manpower.²⁹⁵

Arguments against mandatory retirement. Opponents of a fixed retirement age for judges contend that age is biological, not chronological, and that all men do not lose their mental and physical capabilities at the same age.²⁹⁶ Thus, it is difficult to determine a suitable retirement age. Requiring all judges to retire at the same age may remove many competent judges; opponents of mandatory retirement point out that Justice Holmes of the U.S. Supreme Court remained on the bench well past the age of 70.²⁹⁷ Some critics call attention to the fact that some states with mandatory retirement age circumvent the purpose of the provisions by allowing certain judges to serve on a part-time basis;²⁹⁸ if the judge is able enough to serve part-time, why should he be retired at all? Many opponents feel that removal commissions are the proper vehicle for handling question of judicial incapacity and that specific references to mandatory retirement ages are unnecessary.²⁹⁹

Post-retirement Service

The harshness of mandatory retirement may be offset by provisions allowing the chief justice of the supreme court to call upon retired judges for part-time service. This also provides a source of judicial manpower on both the appellate and trial court level to alleviate heavy case loads.

Legislation in Montana allows retired judges to be called back into active service:

Every judge or justice receiving retirement pay under the provisions of this act [judges' retirement plan applying only to supreme court and district court judges], shall, if physically and

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mentally able, be subject to call by the supreme court or the chief justice thereof to aid and assist the supreme court or any district court under such directions as the supreme court may give, including the examination of the facts and cases before the court, the examination of authorities cited and the preparation of opinions, when and if and to the extent approved by the court, may by the court be ordered to constitute the opinion of such court and such retired judge or justice may, subject to any rule which the supreme court may adopt, perform any and all duties preliminary to the final disposition of cases in so far as not inconsistent with the constitution of the state. Such retired judge or justice when called to service as herein provided shall be reimbursed for his actual expenses, if any, in responding to such call.³⁰⁰

This legislation allows retired judges to serve in commissioner-type functions described in Chapter III.

The Convention may consider whether provision for post-retirement service should be incorporated into the judicial article. Some states, such as New York, Iowa and Alaska, have done so.³⁰¹ The model provisions of the National Municipal League and the retirement service within the same provision. The NML article states:

They [judges of the supreme court, appellate court and general court] shall be retired upon attaining the age of seventy years and may be pensioned as may be provided by law. The chief judge of the supreme court may from time to time appoint retired judges to such special assignments as may be provided by the rules of the supreme court.³⁰²

The ABA model provision is similar except a retirement age is left to legislation:

Every justice and judge shall retire at the age specified by statute at the time of his appointment, but that age shall not be fixed at less than sixty-five years. The Chief Justice is empowered to authorize retired judges to perform temporary judicial duties in any court of the State.³⁰³

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CLERKS OF COURT AND COUNTY ATTORNEYS

Two sections of Article VIII of the Montana Constitution are devoted to clerks. The office of clerk of the supreme court is established in one:

There shall be a clerk of the supreme court, who shall hold his office for the term of six years, except that the clerk first elected shall hold his office only until the general election in the year one thousand eight hundred ninety-two (1892), and until his successor is elected and qualified. He shall be elected by the electors at large of the state, and his compensation shall be fixed by law, and his duties prescribed by law, and by the rules of the supreme court. [Art. VIII, Sec. 9]

District clerks of court are defined in the other:

There shall be a clerk of the district court in each county, who shall be elected by the electors of his county. The clerk shall be elected at the same time and for the same term as the district judge. The duties and compensation of the said clerk shall be as provided by law. [Art. VIII, Sec. 18]

The purpose of these sections is to establish the offices as elective and fix the terms of office. The questions raised by the provisions is whether the office should continue to have constitutional status and whether the office should be elective or appointive.

The duties of clerks on both court levels is administrative in nature: collecting fees, filing legal papers, issuing writs and other documents and maintaining records.³⁰⁴ Thus, the office is necessary to the efficient administration of the judicial system. However, the Advisory Commission on Intergovernmental Relations noted in a recent study:

Even in those states which have a statutorily established court administrator with broad powers and the backing of the highest court, the exercise of controls over the administration of courts at the lower levels may be hampered by an elected clerk of the court (the traditional title for the court administrator). Experience has shown that election bestows independence upon an administrative official and inclines him to resist cooperation and coordination.³⁰⁵

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Four state constitutions--Indiana, Kentucky, Mississippi and Montana--provide for election of supreme court clerks.³⁰⁶ In twenty-six state constitutions, state supreme court clerks are appointed:³⁰⁷ Arizona, Arkansas, Delaware, Florida, Idaho, Kansas, Louisiana, Maryland, Minnesota, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Washington, West Virginia, Wisconsin and Wyoming.

The ACIR reported that in thirty-three states, the clerks of trial courts of general jurisdiction are elected either by statutory or constitutional provisions;³⁰⁸ in fifteen of these states, there is a state court administrator.³⁰⁹ In some states, such as Alaska, Colorado, Hawaii and New Mexico, trial court clerks are appointed.³¹⁰

Neither the ABA model judicial article nor the judicial article of the National Municipal League's Model State Constitution (see appendices E and D respectively) explicitly mention the office of clerk of court. Instead the ABA article states:

The Chief Justice of the State shall be the executive head of the judicial system and shall appoint an administrator of the courts and such assistants as he deems necessary to aid the administration of the courts of the State.³¹¹

The National Municipal League's article grants similar power to the chief justice.³¹² In a comment, the authors of the NML Model stated:

A court system consists of a great deal more than highly qualified judges. It is a large organization that employs many, sometimes thousands of persons--clerks, bailiffs, stenographers, guards, probation officers, etc.--and maintains numerous court buildings and law libraries. It must keep huge permanent files, systems of accounts for the collection of fines and fees, and it must provide a vast administrative machinery to keep court papers flowing in the proper channels. All this requires administrative oversight and, in an integrated court system, it also requires unified administrative planning at the top.³¹³

Although the present constitutional provisions in Montana require the office to be elective, the office of supreme court

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clerk is more or less put under the administrative control of the supreme court by the phrase "his duties prescribed by law, and by the rules of the supreme court." However, if centralized administration of the judicial system is created in Montana, appointed clerks of court on all levels would seem a logical concomitance of such centralized administration.

County Attorneys

The judicial article of the Montana Constitution also establishes the office of county attorney:

There shall be elected at the general election in each county of the state one county attorney, whose qualifications shall be the same as are required for a judge of the district court, except that he must be over twenty-one years of age, and whose term of office shall be four years, and until their successors are elected and qualified. He shall have a salary to be fixed by law, one-half of which shall be paid by the state, and the other half by the county for which he is elected, and he shall perform such duties as may be required by law.
[Art. VIII, Sec. 19]

The major issue related to this provision is whether the office should continue to have constitutional status; if so, should the office be established in the judicial article or in another, such as the local government article? Should the geographical unit served by these attorneys continue to be counties or might judicial districts be more realistic subdivisions? Should the office continue to be elective?

Although the county attorney in Montana handles some civil matters, he is primarily a public prosecutor.³¹⁴ The role of the prosecutor was aptly defined by the ACIR:

The prosecutor acts in behalf of the State in conducting the proceedings against persons suspected of crimes. He has authority to determine whether an alleged offender should be charged and what the charge should be, and to obtain convictions through guilty plea negotiations. He influences and often determines the disposition of all cases brought to him by the police [or sheriff] and often works closely with them on important investigations. His decisions significantly affect the arrest practices

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of the police, the volume of cases in the courts, and the number of offenders referred to the correctional system. The prosecutor, therefore, is potentially a key figure in coordinating the various enforcement and correctional agencies in the criminal justice system.

The historical traditions of the demand for decentralized administration of criminal justice have led to the almost universal practice of electing local prosecutors, largely independent of the attorney general who may, in some instances, have only circumscribed responsibilities in the criminal justice process.³¹⁵

Local Prosecutors in Other States

In a recent study the Advisory Commission on Intergovernmental Relations reported that prosecutions systems vary among the fifty states, ranging from centralized appointive ones in Alaska, Delaware and Rhode Island where the attorney general has charge of all local prosecutions, to the multi-tiered systems of Florida, Mississippi and Utah where local prosecutors are elected by county and judicial district.³¹⁶

The local prosecutor is elected in forty-five states, and appointed in five--Alaska, Connecticut, Delaware, New Jersey and Rhode Island--either on the state or local level (see Table 19). Thirty-seven states give constitutional status to prosecuting attorneys: Alabama, Arizona, Arkansas, California, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia and Wisconsin.³¹⁷ Thirty-six of these constitutions establish the office as elective; under New Jersey's Constitution, the county prosecutor is appointed by the governor with the consent of the senate.³¹⁸

The ACIR classified state prosecutorial systems into nine categories, which illustrate the use of judicial districts or counties for the geographical representation of the office as well as the type of responsibilities placed on local prosecutors:³¹⁹

1. State prosecutor systems: Alaska, Delaware, and Rhode Island.

TABLE 19

LOCAL PROSECUTORS, 1970

State	Title	Jurisdiction	Area	Selected by	Term	Removed by
Alabama	District Attny.	criminal and civil	Judic. Dis.	elected	4	Impeached
Alaska	District Attny. *	criminal, civil, appeals	Jud. Dis. *	Attorney Gen. *		NA
Arizona	County Attny.	criminal and civil	County *	elected *	4 *	NA
Arkansas	Dist. Pros. Attny	criminal only	Judic. Dis.	elected	2	Impeached
California	District Attny.	criminal and civil	County	elected	4	Impeached
Colorado	District Attny.	criminal only	Judic. Dis.	elected	4	Impeached
Conn.	States Attny.	felonies	County	Circuit Ct. *	2	NA
	Chief Pros.	misdemeanors	Circuit *	Circuit Ct. *	NA	NA
Delaware	(no local pros.)		—	—	—	—
Florida . . .	State Attny.	¹	Judic. Ct.	Governor	4	Governor
Goergia . . .	District Attny.	criminal, St. civil appeals	Judic. Dis.	elected	4	Impeached
Hawaii	Co. or City Attny.	criminal and appeals	County	elect. or appt.	NA	NA
Idaho	Prosecuting Attny.	criminal and civil	County	elected	2	NA
Illinois	States Attny.	civil, criminal, appeals	County	elected	4	NA
Indiana	Prosecuting Attny.	criminal only	Judic. Dis.	elected	4	Supreme Court
Iowa	County Attny.	criminal and civil	County	elected	4	recall, impeached
Kansas	County Attny.	civil, criminal, appeals ²	County	elected	2	NA
Kentucky . . .	County Attny.	misdemeanors	County	elected	4	NA
	Comm. Attny.	felonies, State civil	District	elected	6	Impeached
Louisiana . . .	District Attny.	criminal, State civil	Judic. Dis.	elected	6	NA
Maine	County Attny.	criminal and civil	County	elected	2	Gov. and Council
Maryland . . .	State's Attny.	criminal and civil	Co. or City	elected	4	Impeached or AG
Massachusetts .	District Attny.	criminal, State civil, appeals	Jud. Dist.	elected	4	Impeached or AG
Michigan	Prosecuting Attny.	civil, criminal, appeals ³	County	elected	4	Governor
Minnesota . . .	County Attny.	civil, criminal, appeals	County	elected	4	Governor
Mississippi . .	District Attny. *	felony only ⁴	Judic. Dis. *	elected	4	NA
Missouri	Prosecuting Attny.;	criminal ⁵	County	elected	2	Suit, Quo Warranto
	County Attny.	misdemeanor	County	elected	4	NA
Montana	County Attny.	criminal and civil	County	elected	4	NA
Nebraska	County Attny.	criminal and civil	County	elected	4	Governor
Nevada	District Attny.	criminal and civil	County	elected	4	recall, suit
New Hampshire .	County Attny.	civil and criminal ⁶	County	elected	2	Superior Court
New Jersey . .	Co. Prosecutor	criminal only	County	Gov. with con- sent of Senate	5	NA
New Mexico . .	District Attny.	criminal only	Judic. Dis. *	elected	4	NA
New York . . .	District Attny.	criminal, civil, appeals	County	elected	3	Governor
North Carolina .	Solicitors ⁷	criminal only	Solic. Dis.	elected	4	NA
North Dakota .	State's Attny	criminal, civil, appeals	County	elected	2	Governor
Ohio	Prosecuting Attny.	civil, criminal, appeals	County	elected	4	NA
Oklahoma . . .	District Attny.	civil and criminal	District	elected	4	Impeached, suit
Oregon	District Attny	civil, criminal, appeals	County	elected	4	Recall, suit
Pennsylvania . .	District Attny	civil, criminal, appeals	County	elected	4	Impeached
Rhode Island . .	(no local pros.)	—	—	—	—	—
South Carolina .	Solicitor ⁸	criminal, State, civil	Judic. Dis.	elected	4	NA
South Dakota .	State's Attny.	civil and criminal	County	elected	2	Governor
Tennessee . . .	District A.G.	criminal only	Judic. Dis.	elected	8	Impeached

TABLE 19 (Continued)

State	Title	Jurisdiction	Area	Selected by	Term	Removed by
Texas	County Attny.	misdemeanor, felonies ⁹	County *	elected	4	NA
	Crim. Dist. Attny. *	felony only	County	elected	4	NA
	District Attny.	felony only	County	elected	4	NA
Utah	District Attny.	felonies only	Dist.	elected	4	NA
	Co. Attny.	misd., civil	County	elected	4	NA
Vermont	State's Attny.	civil, criminal, appeals	County	elected	2	Impeached
Virginia	Comm. Attny.	civil and criminal	County or City	elected	4	civ. & corp. Courts
Washington	Prosecuting Attny.	civil, criminal, appeals	County	elected	4	Recall, suit
West Virginia	Prosecuting Attny.	civil and criminal	County	elected	4	Impeached
Wisconsin	District Attny.	civil and criminal	County	elected	2*	Governor
Wyoming	County and Prosecuting Attny.	civil and criminal	County	elected	4	Governor

¹ Florida. Felonies except in eight counties which have county solicitors, then only felonies punishable by death and in Dade County and Hillsborough County, which are responsible for prosecution of all crimes, misdemeanors, and felonies, State civil.

² Kansas. Exception in Sedgwick, Wyandotte, and Shawnee Counties—civil in hands of county counselors.

³ Michigan. Exception in some larger counties which have corporation counsel for civil.

⁴ Mississippi. Discretionary as to misdemeanors. County attorneys handle misdemeanors, assist on felonies.

⁵ Missouri. Except City of St. Louis—misdemeanors only. One Circuit Attorney—City of St. Louis—Felony only.

⁶ New Hampshire. Except felonies involving sentences of death or imprisonment for more than 25 years, which are AG's responsibility, although he may delegate them to county attorney.

⁷ District Court Prosecutors in some are selected by presiding judge for minor criminal duties.

⁸ County Solicitors are selected in certain instances to have original jurisdiction over misdemeanors and concurrent jurisdiction over some felonies.

⁹ Texas. If no district attorney, county attorney has jurisdiction over all criminal cases, otherwise only misdemeanors and district attorney prosecutes felonies. If by local and special bill of the legislature a criminal district attorney's office is established offices of district attorney (if any) and county attorney are eliminated with new officer responsible for all crimes.

Source: Advisory Commission on Intergovernmental Relations, State-Local Relations in The Criminal Justice System, Report A-38 (Washington: U.S. Government Printing Office, 1971), pp. 113-114.

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2. State-appointed local prosecutors: Connecticut and New Jersey

3. Local (judicial district) prosecutors with criminal and appeals responsibilities: Georgia and Massachusetts

4. Local (judicial district) prosecutors with solely criminal responsibilities: Arkansas, Colorado, Indiana, New Mexico, North Carolina and Tennessee

5. Local (judicial district) prosecutors with civil and criminal justice responsibilities, but no appeals duties: Alabama, Louisiana, Oklahoma and South Carolina

6. Local (county) prosecutor with criminal and appellate responsibilities: Hawaii, Illinois, Kansas, Michigan, Minnesota, New York, North Dakota, Ohio, Oregon, Pennsylvania, Vermont and Washington.

7. Local (county) prosecutors with solely criminal responsibilities: Missouri and Texas

8. Local (county) prosecutors with criminal and civil, but not appellate responsibilities: Arizona, California, Idaho, Iowa, Maine, Maryland, Montana, Nevada, Nebraska, New Hampshire, South Dakota, Virginia, West Virginia, Wisconsin and Wyoming

9. Overlapping county-judicial district prosecutors: Florida, Kentucky, Mississippi and Utah

Should the Office be Elective or Appointive?

As in selection of judges, controversy surrounds the method by which local prosecutors should be selected. The alternatives in the selection process were examined in the ACIR report:

Opinions conflict on whether the prosecutor should be an elective or appointive official. Earlier studies of the prosecutor's office, such as that of the Wickersham Commission, have indicated that election was a key factor in its weakness due to the incentive it sometimes offered for lax or uneven enforcement of the law. More recent studies, noting the part-time and low salary traits of the

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office, might also be interpreted as an indication that the professionalism of the office has been diluted by its involvement in politics.

Against these views, however, some have noted that the election of the prosecutor assures his "independence", his freedom from outside influence in the exercise of his responsibilities. Hence, we have the description that the "... office of prosecuting attorney has been carved out of that of attorney-general and virtually made an independent office." This feature has been pointed to as indicative of the popular desire for decentralization of the office. Moreover, the constitutionally elective status of the prosecutor in 36 States is said to attest to the popular desire to keep the office under direct public control. From still another vantage point, some have stressed the fact that a number of local prosecutors in large urban areas have succeeded in placing themselves above politics and in developing professional offices which have exemplary records in prosecuting local crime. It has been said that these "... examples show that the elective system can provide competent, professional prosecutors if those who control the process of selection strive for these qualities."

Theoretically, either election or appointment could strengthen the effectiveness of the prosecutor. Election, while involving the prosecutor in partisan or factional politics, can assure that he will possess "... a degree of political independence that is desirable in an officer charged with the investigation and prosecution of charges of bribery and corruption." It may also assure that he will "... come to the office without a comfortable acceptance of the status quo" Moreover since he is a highly "visible" official, public apathy is not likely to occur in the selection of a prosecutor. Public concern, especially at this point in time, will force local political parties to recruit able candidates for the office.

On the other hand, appointment to the office can bring about strict accountability for a comprehensive and rigorous prosecutions policy. State and local chief executives will be held responsible

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for the effective administration of a broader proportion of the criminal justice process, so the argument runs, and hence in a better position to coordinate prosecution policies with other components of the system. In addition, some contend that appointment engenders greater professionalism in the office, especially if the length of appointment is sufficiently long to attract qualified personnel. Appointment also might reduce public antipathy to paying the prosecutor an adequate salary.

Another controversy centers on whether the prosecutor should be appointed by local or State officials. Local appointment is favored on the basis that many localities have administrative responsibilities for lower courts as well as almost exclusive responsibility for the police function. To coordinate police, prosecution, and court policies then, some argue that local appointment of the prosecutor is needed. City attorneys, many of whom already have minor criminal justice responsibilities, are almost invariably appointed.

Others feel that the local prosecutor should be appointed by a state official--either the governor or attorney general. Such a method of selection is held to have a number of benefits. State appointment of local prosecutors could result in more effective enforcement of laws due to greater prosecutorial involvement in the drafting of the criminal code. Appointment by the governor or attorney general also would permit greater statewide coordination of prosecutorial policy and prevent the local prosecutor from independently setting law enforcement priorities. Moreover, appointment at the State level could result in more effective utilization of prosecutorial personnel since it would more easily permit transfer of prosecutors from low to high crime areas.

Treading the middle way in the election-appointment controversy are the National Association of Attorneys General and the ABA. The former group feels there is no single best method since what is appropriate for one state is not necessarily appropriate for another. The ABA, however, believes that the prosecutor should be elected on a non-partisan basis, using the "merit" plan similar to the Missouri plan for selection of judges. Those who advocate this method of selection

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see it as a means of removing the office from politics. Such advocates feel that nonpartisan "merit" selection would have the benefits of increasing public confidence in the office's enforcement policies, of reducing the amount of time a prosecutor has to spend in partisan political matters, and of attracting more qualified candidates to the office. These changes, so the case runs, would raise markedly the professional status of the office.

Critics of the "merit" selection plan note that the prosecutor if he is to be an elective official, needs the organizational and financial support of an established party. The "merit" plan of selection provides no necessary incentive for selection of candidates of a higher caliber, and the nonpartisan election tends to reduce voter interest in the prosecutor's election. Both of these factors, some feel, cause the prosecutor to devote disproportionate time to building an independent base of public support as well as to prevent less established lawyers from campaigning for the office.

In summary, the prosecutor has long been an elected local official. His office was created as a result of the need for a more decentralized administration of justice, and over time the local prosecutor was delegated criminal justice powers that formerly had been within the province of the Attorney General. Accompanying this delegation of power was the growing popularity of direct election of the prosecutor; this was in keeping with Jacksonian and later Progressive principles regarding popular control of public officials, strict accountability on their part to the electorate, and keeping the system honest.

Of late, election of the prosecutor has been criticized on the basis that it lowers the professionalism of the office. Critics contend that this method of selection is responsible for the part-time and underpaid character of the office in many areas. Only by the process of appointment or at least nonpartisan election will more qualified personnel be attracted to the profession and prosecutorial policies be better coordinated with other parts of the criminal justice system. Appointment advocates underscore the need to strengthen the position of chief executives in the system, noting that real coordination is rarely produced by a number of elected officials with separate constituencies and separately assigned responsibilities.

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On the other hand, defenders of local election of the prosecutor point out that it is instrumental in keeping the office "independent" and responsive to popular demands. They contend that election generates greater public interest in the function and allows the public a sense of participation in the criminal justice system. Moreover, some maintain the existence of an "independent" prosecutor may be necessary for effective implementation of prosecutorial policy without which the whole system suffers. His independence, after all, means he will be less subject to conflicting political pressures in the administration of prosecution policy than would be the case with a State or local chief executive. Proponents of local election almost always contend that appointment by a State official would involve the local prosecutor in more not less politics, and, in any event, excessive bureaucratization of the prosecution function necessarily would result.

Finally, the present system in the 45 States relying basically on local election is defended by some on the very practical grounds that the bulk of the local district attorneys would oppose a major change in the mode of selection and too much political currency would be expended on an effort that in no way necessarily assures a more effective prosecutorial component of the criminal justice system.

The controversy over the method of selection, then, centers on whether election or appointment will ultimately inject greater professionalism into what is now an undermanned and underpaid function in too many areas. Both methods of selection can result in the selection of able prosecutors. Both methods of selection can result in better coordination of prosecution policies with other parts of the criminal justice system. Conclusive proof, then, is still lacking as to whether the method of selection will make a wholesale difference in the quality of prosecution in many areas. Quite possibly an improved prosecution function will come about as a result of other reforms.³²⁰

Other Considerations

As indicated in Table 19, fifteen states utilize judicial districts as a basis for distributing public prosecutors. If the

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office of county attorney in Montana were re-established as a district attorney, conforming with judicial districts, the number of offices would be reduced from fifty-six to eighteen; however, reduction of offices would not necessarily indicate a reduction of staff. More deputy officers may be necessary in order to handle the enlarged geographical jurisdiction of the office.

Two problems related to the issue of district attorney vs. county attorney are the sharing arrangements for prosecutor's salaries and the part-time nature of the office.

The ACIR report showed that seven states share the cost of local prosecutors' salaries with local governmental subdivisions: Colorado, Indiana, Louisiana, Mississippi, Montana, Oklahoma and Virginia.³²¹ Twenty-five states require county governments to pay the entire salary, while fourteen states assume the full cost of his salary:³²² Alabama, Arkansas, Florida, Georgia, Idaho, Illinois, Maine, New Mexico, North Carolina, Oregon, South Carolina, Tennessee, Utah and Vermont. Alabama, Georgia, Oregon and Tennessee allow county supplements to this aid.³²³ In Montana the salary is paid half by the state and half by the county. The amount of annual compensation is determined by a legislative schedule based on population and taxable valuation of the county.³²⁴ The number of deputies hired and their salary is determined by the board of county commissioners in each county.³²⁵ If the offices of county attorney were consolidated into district offices one advantage might be higher compensation. The salaries involved could be pro-rated among the counties within the district and the state. Higher compensation would enable full-time devotion to the duties of the office.

Most county attorneys in Montana supplement their salaries with income from the private practice of law. The reason for such supplementation is low pay; the result is part-time attention to the duties of the office. The report of The Courts Task Force of the President's Crime Commission, as summarized in the ACIR report, discussed the problem of part-time prosecutors:

The Courts Task Force of the President's Crime Commission stated that " . . . the attorneys he (local prosecutor) deals with as a public officer are the same ones with whom he is expected to maintain a less formal and more accommodating relationship as counsel to private clients. Similar problems may arise in the prosecutor's dealing with his private clients whose activities may come to his official

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attention." In addition to this conflict of interest, the part-time prosecutor may give insufficient time and energy to his official duties. "Since his salary is a fixed amount, and his total earnings depend on what he can derive from his private practice, there is a continuing temptation to give priority to private clients."

The Courts Task Force concluded that part-time employment is related to low pay and the workload of the office. Regarding low pay, the Task Force observed that high quality attorneys will not seek prosecutorial offices unless the economic rewards are high enough. "Full-time devotion to duty cannot be demanded unless the pay is raised and salary scales are based on the assumption that the prosecutor will not have a second income from outside law practice."

The Task Force contended most cities cannot justify continuation of part-time prosecutors. They have heavy workloads that demand the fullest attention without distractions by other obligations and interests. Yet the National District Attorneys Association found that in 1969 a number of prosecutors' offices in urban areas permitted their attorneys to pursue the private practice of law. Included were Harris County (Houston), Texas; Cuyahoga County (Cleveland), Ohio; Baltimore, Maryland; Hartford County, Connecticut; Passaic County, New Jersey; Pulaski County (Little Rock), Arkansas; Lancaster County (Lincoln), Nebraska; and Covington, Kentucky. Of 37 prosecutorial districts with a population of 100,000 or more, 15 permitted such outside employment.

The problem of a small workload as a cause of part-time employment is found mainly in lightly-populated jurisdictions. As the ABA's Advisory Committee on the Prosecution and Defense Functions noted:

"Prosecutory officers in Pennsylvania face the same problems as those found in all other States. Scarce resources make the full-time adequately staffed district attorneys office a rarity. Only in the very largest cities where salaries are relatively adequate do we have full-time staffs. The vast majority of Pennsylvania's counties must settle for part-time law enforcement."

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The Courts Task Force noted that some States have moved in the direction of creating district attorneys' offices covering judicial districts larger than one county. In Oklahoma, for example, the county system was revised in 1965 in favor of a system of prosecutorial districts corresponding to the State's judicial districts. The inadequate fiscal resources of counties had prevented payment of fair compensation to the attorneys, a situation which reached crisis proportions in 1964 when no attorneys sought election as a county attorney in 55 of the State's 77 counties.

In 1967, Minnesota was given Federal grant support by the Office of Law Enforcement Assistance to test the effectiveness of full-time prosecutors in rural areas then served only by part-time prosecutors. Under joint sponsorship of the State Judicial Council and the attorney general, two districts were established, one encompassing 15 counties and the other 17 counties. The counties would not accept abolition of the county prosecutor's office, so the full-time district prosecutors were imposed on the existing part-time county prosecutor system, providing assistance in some cases and relief from trial burdens in others. According to two LEAA officials, the "half-way" arrangement demonstrated sufficient value to help secure continuation of the program with local support after the Federal grant was terminated.

The ABA Advisory Committee recommended that "Wherever possible, a unit of prosecution should be designed on the basis of population, caseload and other relevant factors sufficient to warrant at least one full-time prosecutor and the supporting staff necessary to effective prosecution." The National Association of Attorneys General and the Board of Directors of the National District Attorneys Association favor similar action.

A major concern in expanding the territory of prosecutorial districts is the fear of losing responsiveness to local conditions. The prosecutor's familiarity with the community helps him in gathering evidence, allocating resources to the various activities of his office, and appraising the disposition appropriate to particular offenses and offenders. The same fears, of course, may be expressed in opposition to any move

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toward statewide coordination of the prosecution function aimed at promoting reasonable uniformity of policies and practices. As the Courts Task Force pointed out, sensitivity to local conditions may be retained by following the Oklahoma pattern whereby the district attorney serving a multi-county district is required to select one assistant from each of the counties in his district. The difficulty with that solution is that a county's workload may not warrant the full-time attention of one attorney.³²⁶

Another consideration in relation to the county attorney's post is whether it should remain a constitutional office. Thirteen state constitutions--Alaska, Connecticut, Delaware, Hawaii, Kansas, Maine, Minnesota, Missouri, Nebraska, Ohio, Oklahoma, Rhode Island and Wyoming--contain no provisions establishing the office of local prosecutor. Furthermore, among the states where it is constitutionally provided, the office appears in the judicial article of twenty constitutions, including Montana, in an article relating to local government in ten constitutions and in a "public officers" article in three. The Convention, if it retains the office in the constitution, may wish to place it in the local government article.

CHAPTER IV

NOTES

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188. "Remedies for Judicial Misconduct and Disability," pp. 185-186; New York Commission, The Judiciary, p. 45; Pennsylvania Preparatory Committee, The Judiciary, p. 177.
189. New York Commission, The Judiciary, p. 49.
190. Ibid., pp. 49-50; Hawaii Bureau, Article V: The Judiciary, p. 4; Pennsylvania Preparatory Committee, The Judiciary, p. 177.

191. Hawaii Bureau, Article V: The Judiciary, p. 42; New York Commission, The Judiciary, pp. 50-51; Pennsylvania Preparatory Committee, The Judiciary, p. 178.
192. New York Commission, The Judiciary, p. 51; Pennsylvania Preparatory Committee, The Judiciary, p. 178.
193. Hawaii Bureau, Article V: The Judiciary, p. 41; Pennsylvania Preparatory Committee, The Judiciary, p. 178.
194. Ibid.; New York Commission, The Judiciary, pp. 50-51.
195. Delaware Const. Art. IV, Sec. 37; Oklahoma Const. Art. VII-A.
196. Oklahoma Const. Art. VII-A, Sec. 2.
197. Ibid., Sec. 5.
198. Ibid., Sec. 6.
199. Ibid., Sec. 2.
200. Ibid., Sec. 4.
201. Ibid., Sec. 1(b).
202. Ibid., Sec. 1(c).
203. New Jersey Const. Art. VI, Sec. 6, par. 4.
204. New Jersey Statutes, 1970 Cumulative Supplement, Title 2A, Ch. 1B. See also Hawaii Bureau, Article V: The Judiciary, p. 42.
205. In re Pagliughi, 39 N.J. 517 (1963). See also Pennsylvania Preparatory Committee, The Judiciary, pp. 182-183; Hawaii Bureau, Article V: The Judiciary, p. 42.
206. Revised Codes of Montana, 1947, Sec. 93-2026.
207. Montana Const. Art. VIII, Sec. 2.
208. "Remedies for Judicial Misconduct and Disability," pp. 192-193; Pennsylvania Preparatory Committee, The Judiciary, p. 183; Hawaii Bureau, Article V: The Judiciary, p. 42.
209. "Remedies for Judicial Misconduct and Disability," p. 193.
210. Pennsylvania Preparatory Committee, The Judiciary, p. 183; Hawaii Bureau, Article V: The Judiciary, p. 43.
211. Pennsylvania Preparatory Committee, The Judiciary, pp. 183, 195.

212. ACIR, State-Local Relations, pp. 103-104; AJS, Judicial Discipline and Removal, pp. 41-49; Virginia Const. Art. VI, Sec. 10.
213. California Const. Art. VI, Sec. 18.
214. Ibid., Sec. 8.
215. "Remedies for Judicial Misconduct and Disability," p. 176; Pennsylvania Preparatory Committee, The Judiciary, p. 179.
216. Davis, "The Chandler Incident," p. 453; Frankel, "Judicial Discipline and Removal," p. 1128; Joiner, "The Judiciary," p. 193; "Remedies for Judicial Misconduct and Disability," pp. 177-181; Hawaii Bureau, Article V: The Judiciary, p. 39; Pennsylvania Preparatory Committee, The Judiciary, p. 180; New York Commission, The Judiciary, pp. 52-53.
217. California Const. Art. VI, Sec. 18(c).
218. Ibid., Sec. 18(e) which states: "The Judicial Council shall make rules implementing this section and providing for confidentiality of proceedings." Rule 902 states: "All papers filed with and proceedings before the Commission, or before the masters appointed by the Supreme Court shall be confidential until a record is filed by the Commission in the Supreme Court."
219. Joiner, "The Judiciary," p. 193; Louis H. Burke, "Judicial Discipline and Removal - The California Story," Judicature 48 (1965): 170. Cited hereafter as Burke, "The California Story."
220. Burke, "The California Story," p. 171.
221. See Colorado Const. Art. VI, Sec. 23(3) (seven-member commission); New Mexico Const. Art. 6, Sec. 32 (general assembly orders retirement, discipline or removal).
222. General Laws of Idaho, Annotated, Vol 2, 1967 Cumulative Supplement, Sec. 1-2102.
223. Illinois Const. Art. VI, Sec. 15.
224. New York Commission, The Judiciary, p. 53; Pennsylvania Preparatory Committee, The Judiciary, p. 181; "Remedies for Judicial Misconduct and Disability," p. 183.
225. Ibid.
226. Hawaii Bureau, Article V: The Judiciary, p. 40; Pennsylvania Preparatory Committee, The Judiciary, p. 181; New York Commission, The Judiciary, p. 53.

227. Pennsylvania Preparatory Committee, The Judiciary, p. 181; "Remedies for Judicial Misconduct and Disability," p. 184.
228. Pennsylvania Preparatory Committee, The Judiciary, p. 181.
229. Frankel, "Judicial Discipline and Removal," p. 1128.
230. Pennsylvania Preparatory Committee, The Judiciary, p. 182.
231. Hawaii Bureau, Article V: The Judiciary, p. 40; New York Commission, The Judiciary, p. 53.
232. Frankel, "Judicial Discipline and Removal," pp. 1122-1124; "Remedies for Judicial Misconduct and Disability," pp. 154-161.
233. California Const. Art. VI, Sec. 18(c)(2); Stevens v. Commission on Judicial Qualifications, 39 Cal. Rptr. 397, 393 P.2d 709 (1964).
234. Frankel, "Judicial Discipline and Removal," p. 1129.
235. American Bar Association, Model State Judicial Article (1962), Sec. 6, par. 4. Cited hereafter as ABA, Model Article (1962).
236. AJS, Judicial Discipline and Removal, pp.41-47.
237. Pennsylvania Preparatory Committee, The Judiciary, p. 145.
238. Revised Codes of Montana, 1947, Sec. 16-3605.
239. Ibid., Secs. 93-305, 306.
240. Ibid., Secs. 93-903, 904.
241. Ibid., Sec. 93-901. See Revised Codes of Montana, 1947, Sec. 11-1604 for disqualification of police judges.
242. American Bar Association, Canons of Judicial Ethics, Canon Nos. 24-33.
243. Ibid., Canon No. 34.
244. Provisions similar to those cited below can be found in Florida Const. Art. V, Sec. 18; Hawaii Const. Art. V, Sec. 3, par. 2.
245. See Connecticut Const. Fifth Art; Rhode Island Const. Art X.
246. American Bar Association, Handbook on the Administration of Justice, 4th ed. (Chicago: 1961) p. 36.

247. Montana Const. Art. VIII, Secs. 7, 12, 20 respectively.
248. Revised Codes of Montana, 1947, Sec. 11-709.
249. Robert F. Frinan, S.J., "Judicial Appointment for Life by the Executive Branch of Government: Reflections on the Massachusetts Experience," Texas Law Review 44 (1966): 1111. Cited hereafter as Frinan, "Reflections on the Massachusetts Experience."
250. Ibid., p. 1110.
251. New York Commission, The Judiciary, p. 34.
252. Pennsylvania Preparatory Committee, The Judiciary, p. 142.
253. Frinan, "Reflections on the Massachusetts Experience," p. 1112.
254. Hawaii Bureau, Article V: The Judiciary, p. 29; New York Commission, The Judiciary, p. 34.
255. Pennsylvania Preparatory Committee, The Judiciary, p. 142.
256. New Jersey Const. Art. VI, Sec. 3.
257. NML, Model Constitution, 6th ed., Sec. 6.04(c).
258. Illinois Const. Art. VI, Secs. 12(d), 10.
259. ABA Model Article (1962), Sec. 6.1.
260. Joiner, "The Judiciary," p. 191.
261. U.S. Const. Art. III, Sec. 1.
262. See State ex rel. Jackson v. Porter, 57 Mont. 343, 188 Pac. 375 (1920).
263. 1963 Laws of Montana, Ch. 92.
264. Revised Codes of Montana, 1947, Secs. 25-501, 93-303, as amended in Extraordinary Session II, 1971.
265. See Chapter III.
266. See Chapter II.
267. Information obtained by telephone conversations with District Judge E. Gardner Brownlee, Missoula, on December 2, 1971, and the office of Police Judge Donald Bjertness, Billings, on December 6, 1971.
268. ACIR, State-Local Relations, pp. 204-205.

269. Ibid., p. 204.
270. Ibid.
271. Ibid.
272. West's Annotated California Codes, Government, Sec. 68203.
273. NML, Model Constitution, 6th ed., Sec. 6.06.
274. ABA, Model Article (1962), Sec. 7, par. 1.
275. Revised Codes of Montana, 1947, Title 93, Ch. 11.
276. Ibid., Secs. 93-1115, 1116.
277. Ibid., Sec. 93-1111.
278. Ibid., Sec. 93-1116.
279. Ibid., Sec. 93-1117.
280. Ibid., Secs. 93-1117, 1121.
281. Ibid., Sec. 93-1118.
282. Ibid., Secs. 93-1119 to 1121, 1131.
283. Delaware Const. Art. IV, Sec. 37 as amended in 1969. Similar language found in New York Const. Art. VI, Sec. 22a; Oklahoma Const. Art. VII-A, Sec. 1(c).
284. California Const. Art. VI, Sec. 18 (c)(1). Similar language found in Alaska Statutes (1962), Sec. 22.30.070 (c)(1); Colorado Const. Art. VI, Sec. 23(b); General Laws of Idaho, Annotated, Ch. 21, Sec. 1-2103; Louisiana Const. Art. IX, Sec. 4B; Maryland Const. Art. IV, Sec. 4B(a); Nebraska Const. Art. V, Sec. 30(1); New Mexico Const. Art. VI, Sec. 32; Texas Const. Art. 5, Sec. 1-a(6); Hawaii Revised Statutes, 1969 Supplement, Sec. 610-3.
285. Pennsylvania Preparatory Committee, The Judiciary, p. 205.
286. ABA, Model Article (1962), Sec. 6, par. 3.
287. ACIR, State-Local Relations, p. 206.
288. President's Crime Commission, The Challenge of Crime in a Free Society (Washington: U.S. Government Printing Office, 1967), p. 147.
289. ACIR, State-Local Relations, p. 206.

290. Alaska Const. Art. IV, Sec. 11; New York Const. Art. VI, Sec. 25b; Maryland Const. Art. IV, Sec. 3; Florida Const. Art. V, Sec. 17A(1).
291. Colorado Const. Art. VI, Sec. 23(1).
292. Revised Codes of Montana, 1947, Sec. 93-1121.
293. Pennsylvania Preparatory Committee, The Judiciary, p. 203.
294. ACIR, State-Local Relations, p. 206.
295. Pennsylvania Preparatory Committee, The Judiciary, p. 203.
296. Ibid., p. 204.
297. Ibid.
298. ACIR, State-Local Relations, p. 206.
299. Ibid.
300. Revised Codes of Montana, 1947, Sec. 93-1130.
301. New York Const. Art. VI, Sec. 25b; Iowa Const. Art. V, Sec. 18; Alaska Const. Art. IV, Sec. 11.
302. NML, Model Constitution, 6th ed., Alternative Sec. 6.04(c).
303. ABA, Model Article (1962), Sec. 6, par. 2.
304. In general, see Revised Codes of Montana, 1947, Title 16, Ch. 30; Title 82, Ch. 5.
305. ACIR, State-Local Relations, p. 100.
306. Indiana Const. Art. 7, Sec. 7; Kentucky Const. Sec. 120; Mississippi Const. Art. 6, Sec. 168; Montana Const. Art. VIII, Sec. 9.
307. Alabama Const. Art. VI, Sec. 164; Arizona Const. Art. VI, Sec. 7; Arkansas Const. Art. VII, Sec. 7; Delaware Const. Art. IV, Sec. 27; Florida Const. Art. V, Sec. 4; Idaho Const. Art. V, Sec. 15; Kansas Const. Art. 3, Sec. 4; Louisiana Const. Art. VII, Sec. 15; Maryland Const. Art. IV, Sec. 17; Minnesota Const. Art. VI, Sec. 2; Nebraska Const. Art. V, Sec. 8; New Hampshire Const. Art. 82; New Jersey Const. Art. VI, Sec. VII, par. 3; New Mexico Const. Art. VI, Sec. 9; New York Const. Art. VI, Sec. 2; North Dakota Const. Art. IV, Sec. 93; Oklahoma Const. Art. VII, Sec. 5; South Carolina Const. Art. V, Sec. 7; South Dakota Const. Art. V, Sec. 12; Tennessee Const. Art. VI, Sec. 13; Texas Const. Art. V, Sec. 3; Utah Const.

Art. 8, Sec. 14; Washington Const. Art. IV, Sec. 22;
West Virginia Const. Art. VIII, Sec. 8; Wisconsin Const.
Art. VII, Sec. 12; Wyoming Const. Art. V, Sec. 9.

- 308. ACIR, State-Local Relations, p. 100.
- 309. Ibid.
- 310. Alaska Statutes, Sec. 22.05.160; Colorado Revised Statutes,
Sec. 37-12-27; Hawaii Revised Statutes, Sec. 606-1;
New Mexico Statutes Annotated, Sec. 16-3-6.
- 311. AEA, Model Article (1962), Sec. 8, par. 2.
- 312. NML, Model Constitution, 6th ed., Sec. 6.05.
- 313. Ibid., Comment.
- 314. Revised Codes of Montana, 1947, Title 16, Ch. 31.
- 315. ACIR, State-Local Relations, p. 112.
- 316. Ibid.
- 317. Alabama Const. Art. VI, Sec. 167; Arizona Const. Art. XII,
Sec. 3; Arkansas Const. Art. VII, Sec. 24; California Const.
Art. XI, Sec. 5; Colorado Const. Art. VI, Sec. 13; Florida
Const. Art. V, Sec. 6(6); Georgia Const. Art. VI, Sec. XI;
Idaho Const. Art. V, Sec. 18; Illinois Const. Art. VI,
Sec. 19; Indiana Const. Art. 7, Sec. 11; Iowa Const. Art.
V, Sec. 13; Kentucky Const. Secs. 97, 99; Louisiana Const.
Art. VII, Sec. 58; Maryland Const. Art. V, Sec. 7; Massa-
chusetts Const. Art. XIX (amendment); Michigan Const. Art.
VII, Sec. 4; Mississippi Const. Art. 6, Sec. 174; Montana
Const. Art. VIII, Sec. 19; Nevada Const. Art. IV, Sec. 32;
New Hampshire Const. Part II, Art. 71; New Jersey Const.
Art. VII, Sec. II(1); New Mexico Const. Art. VI, Sec. 24;
New York Const. Art. XIII, Sec. 13; North Carolina Const.
Art. IV, Sec. 17; North Dakota Const. Art. X, Sec. 173;
Oregon Const. Art. VII, Sec. 17; Pennsylvania Const. Art.
XIV, Sec. 2; South Carolina Const. Art. V, Sec. 29; South
Dakota Const. Art. V, Sec. 24; Tennessee Const. Art. VI,
Sec. 5; Texas Const. Art. V, Sec. 21; Utah Const. Art. 8,
Sec. 10; Vermont Const. Ch. II, Sec. 35; Virginia Const.
Art. VII, Sec. 4; Washington Const. Art. XI, Sec. 5, West
Virginia Const. Art. IX, Sec. 1; Wisconsin Const. Art. VI,
Sec. 4.
- 318. New Jersey Const. Art. VII, Sec. II(1).
- 319. ACIR, State-Local Relations, p. 113.
- 320. Ibid., pp. 218-219.

- 321. Ibid., p. 118.
- 322. Ibid.
- 323. Ibid.
- 324. Revised Codes of Montana, 1947, Sec. 25-605.
- 325. Ibid., Sec. 25-604.
- 326. ACIR, State-Local Relations, p. 220.

APPENDIX A

MONTANA CONSTITUTIONAL PROVISIONS ON THE JUDICIARY

ARTICLE VIII

JUDICIAL DEPARTMENTS

Section 1. The judicial power of the state shall be vested in the senate sitting as a court of impeachment, in a supreme court, district courts, justices of the peace, and such other inferior courts as the legislative assembly may establish in any incorporated city or town.

SUPREME COURT

Section 2. The supreme court, except as otherwise provided in this constitution, shall have appellate jurisdiction only, which shall be co-extensive with the state, and shall have a general supervisory control over all inferior courts, under such regulations and limitations as may be prescribed by law.

Section 3. The appellate jurisdiction of the supreme court shall extend to all cases at law and in equity, subject, however, to such limitations and regulations as may be prescribed by law. Said court shall have power in its discretion to issue and to hear and determine writs of habeas corpus, mandamus, quo-warranto, certiorari, prohibition and injunction, and such other original and remedial writs as may be necessary or proper to the complete exercise of its appellate jurisdiction. When a jury is required in the supreme court to determine an issue of fact, said court shall have power to summon such jury in such manner as may be provided by law. Each of the justices of the supreme court shall have power to issue writs of habeas corpus to any part of the state, upon petition by or on behalf of any person held in actual custody, and may make such writs returnable before himself, or the supreme court, or before any district court of the state, or any judge thereof; and such writs may be heard and determined by the justice or court, or judge, before whom they are made returnable. Each of the justices of the supreme court may also issue and hear and determine writs of certiorari in proceedings for contempt in the district court, and such other writs as he may be authorized by law to issue.

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Section 4. At least three terms of the supreme court shall be held each year at the seat of government.

Section 5. The supreme court shall consist of three justices, a majority of whom shall be necessary to form a quorum or pronounce a decision, but one or more of said justices may adjourn the court from day to day, or to a day certain and the legislative assembly shall have the power to increase the number of said justices to not less nor more than five. In case any justice or justices of the supreme court shall be in any way disqualified to sit in a cause brought before such court, the remaining justice or justices shall have power to call on one or more of the district judges of this state as in the particular case may be necessary to constitute the full number of justices of which the said court shall then be composed, to sit with them in the hearing of said cause. In all cases where a district judge is invited to sit and does sit as by this section provided, the decision and opinion of such district judge shall have the same force and effect in any cause heard before the court as if regularly participated in by a justice of the supreme court.

Section 6. The justices of the supreme court shall be elected by the electors of the state at large, as hereinafter provided.

Section 7. The term of office of the justices of the supreme court, except as in this constitution otherwise provided, shall be six years.

Section 8. There shall be elected at the first general election, provided for by this constitution, one chief justice and two associate justices of the supreme court. At said first election the chief justice shall be elected to hold his office until the general election in the year one thousand eight hundred ninety-two (1892), and one of the associate justices to hold his office until the general election in the year one thousand eight hundred ninety-four (1894), and the other associate justice to hold his office until the general election in the year one thousand eight hundred ninety-six (1896), and each shall hold until his successor is elected and qualified. The terms of office of said justices, and which one shall be chief justice, shall at the first and all subsequent elections be designated by ballot. After said first election one chief justice or one associate justice shall be elected at the general election every two years, commencing in the year one thousand eight hundred ninety-two (1892), and if the legislative assembly

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shall increase the number of justices to five, the first terms of office of such additional justices shall be fixed by law in such manner that at least one of the five justices shall be elected every two years. The chief justice shall preside at all sessions of the supreme court, and in case of his absence, the associate justice having the shortest term to serve shall preside in his stead.

Section 9. There shall be a clerk of the supreme court, who shall hold his office for the term of six years, except that the clerk first elected shall hold his office only until the general election in the year one thousand eight hundred ninety-two (1892), and until his successor is elected and qualified. He shall be elected by the electors at large of the state, and his compensation shall be fixed by law, and his duties prescribed by law, and by the rules of the supreme court.

Section 10. No person shall be eligible to the office of justice of the supreme court, unless he shall have been admitted to practice law in the supreme court of the territory or state of Montana, be at least thirty years of age, and a citizen of the United States, nor unless he shall have resided in said territory or state at least two years next preceding his election.

DISTRICT COURTS

Section 11. The district courts shall have original jurisdiction in all cases at law and in equity, including all cases which involve the title or right of possession of real property, or the legality of any tax, impost, assessment, toll or municipal fine, and in all cases in which the debt, damage, claim or demand, exclusive of interest, or the value of the property in controversy exceeds fifty dollars; and in all criminal cases amounting to felony, and in all cases of misdemeanor not otherwise provided for; of actions of forcible entry and unlawful detainer; of proceedings in insolvency; of actions to prevent or abate a nuisance; of all matters of probate; of actions of divorce and for annulment of marriage, and for all such special actions and proceedings as are not otherwise provided for. And said courts shall have the power of naturalization, and to issue papers therefor, in all cases where they are authorized so to do by the laws of the United States. They shall have appellate jurisdiction in such cases arising in justices and other inferior courts in their respective districts as may be prescribed by law and consistent with this constitution. Their process shall extend to all parts

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of the state, provided that all actions for the recovery of, the possession of, quieting the title to, or for the enforcement of liens upon real property, shall be commenced in the county in which the real property, or any part thereof, affected by such action or actions, is situated. Said courts and the judges thereof shall have power also to issue, hear and determine writs of mandamus, quo warranto, certiorari, prohibition, injunction and other original and remedial writs, and also all writs of habeas corpus on petition by, or on behalf of, any person held in actual custody in their respective districts. Injunctions, writs of prohibition and habeas corpus, may be issued and served on legal holidays and non-judicial days.

Section 12. The state shall be divided into judicial districts, in each of which there shall be elected by the electors thereof one judge of the district court, whose term of office shall be four years, except that the district judges first elected shall hold their offices only until the general election in the year one thousand eight hundred and ninety-two (1892), and until their successors are elected and qualified. Any judge of the district court may hold court for any other district judge, and shall do so when required by law.

Section 13. Until otherwise provided by law judicial districts of the state shall be constituted as follows: First district, Lewis and Clark county; second district, Silver Bow county; third district, Deer Lodge county; fourth district, Missoula county; fifth district, Beaverhead, Jefferson and Madison counties; sixth district, Gallatin, Park and Meagher counties; seventh district, Yellowstone, Custer and Dawson counties; eighth district, Choteau, Cascade and Fergus counties.

Section 14. The legislative assembly may increase or decrease the number of judges in any judicial district; provided, that there shall be at least one judge in any district established by law; and may divide the state, or any part thereof, into new districts; provided, that each be formed of compact territory and be bounded by county lines, but no changes in the number or boundaries of districts shall work a removal of any judge from office during the term for which he has been elected or appointed.

Section 15. Writs of error and appeals shall be allowed from the decisions of said district courts to the supreme court under such regulations as may be prescribed by law

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Section 16. No person shall be eligible to the office of judge of the district court unless he be at least twenty-five years of age and a citizen of the United States, and shall have been admitted to practice law in the supreme court of the territory or state of Montana, nor unless he shall have resided in this state or territory at least one year next preceding his election. He need not be a resident of the district for which he is elected at the time of his election, but after his election he shall reside in the district for which he is elected during his term of office.

Section 17. The district court in each county which is a judicial district by itself shall be always open for the transaction of business, except on legal holidays and non-judicial days. In each district where two or more counties are united, until otherwise provided by law, the judges of such district shall fix the term of court, provided that there shall be at least four terms a year held in each county.

Section 18. There shall be a clerk of the district court in each county, who shall be elected by the electors of his county. The clerk shall be elected at the same time and for the same term as the district judge. The duties and compensation of the said clerk shall be as provided by law.

Section 19. There shall be elected at the general election in each county of the state one county attorney, whose qualifications shall be the same as are required for a judge of the district court, except that he must be over twenty-one years of age, but need not be twenty-five years of age, and whose term of office shall be four years, and until their successors are elected and qualified. He shall have a salary to be fixed by law, one-half of which shall be paid by the state, and the other half by the county for which he is elected, and he shall perform such duties as may be required by law.

JUSTICES OF THE PEACE

Section 20. There shall be elected in each organized township of each county by the electors of such township at least two justices of the peace, who shall hold their offices, except as otherwise provided in this constitution, for the term of two years. Justices' courts shall have such original jurisdiction within their respective counties as

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may be prescribed by law, except as in this constitution otherwise provided; provided, that they shall not have jurisdiction in any case where the debt, damage, claim or value of the property involved exceeds the sum of three hundred dollars.

Section 21. Justices' courts shall not have jurisdiction in any case involving the title or right of possession of real property, nor in cases of divorce, nor for annulment of marriage, nor of cases in equity; nor shall they have power to issue writs of habeas corpus, mandamus, certiorari, quo warranto, injunction, or prohibition, nor the power of naturalization; nor shall they have jurisdiction in cases of felony, except as examining courts; nor shall criminal cases in said courts be prosecuted by indictment; but said courts shall have such jurisdiction in criminal matters, not of the grade of felony, as may be provided by law; and shall also have concurrent jurisdiction with the district courts in cases of forcible entry and unlawful detainer.

Section 22. Justices' courts shall always be open for the transaction of business, except on legal holidays and non-judicial days.

Section 23. Appeal shall be allowed from justices' courts, in all cases, to the district courts, in such manner and under such regulations as may be prescribed by law.

POLICE AND MUNICIPAL COURTS

Section 24. The legislative assembly shall have power to provide for creating such police and municipal courts and magistrates for cities and towns as may be deemed necessary from time to time, who shall have jurisdiction in all cases arising under the ordinances of such cities and towns, respectively; such police magistrates may also be constituted ex-officio justices of the peace for their respective counties.

MISCELLANEOUS PROVISIONS

Section 25. The supreme and district courts shall be courts of record.

Section 26. All laws relating to courts shall be general and of uniform operation throughout the state; and the organization, jurisdiction, powers, proceedings and

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practice of all courts of the same class or grade, so far as regulated by law, shall be uniform.

Section 27. The style of all process shall be "The State of Montana," and all prosecutions shall be conducted in the name and by the authority of the same.

Section 28. There shall be but one form of civil action, and law and equity may be administered in the same action.

Section 29. The justices of the supreme court and the judges of the district courts shall each be paid quarterly by the state, a salary, which shall not be diminished during the terms for which they shall have been respectively elected.

Section 30. No justice of the supreme court nor judge of the district court shall accept or receive any compensation, fee, allowance, mileage, perquisite or emolument for or on account of his office, in any form whatever, except the salary provided by law.

Section 31. No justice or clerk of the supreme court, nor judge or clerk of any district court shall act or practice as an attorney or counsellor at law in any court of this state during his continuance in office.

Section 32. The legislative assembly may provide for the publication of decisions and opinions of the supreme court.

Section 33. All officers provided for in this article, excepting justices of the supreme court, who shall reside within the state, shall respectively reside during their term of office in the district, county, township, precinct, city or town for which they may be elected or appointed.

Section 34. Vacancies in the office of justice of the supreme court, or judge of the district court, or clerk of the supreme court, shall be filled by appointment, by the governor of the state, and vacancies in the offices of county attorney, clerk of the district court, and justices of the peace, shall be filled by appointment, by the board of county commissioners of the county where such vacancy occurs. A person appointed to fill any such vacancy shall hold his office until the next general election and until his successor is elected and qualified. A person elected to fill a vacancy shall hold office until the expiration of the term for which the person he succeeds was elected.

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Section 35. No justice of the supreme court or district judge shall hold any other public office while he remains in the office to which he has been elected or appointed.

Section 36. A civil action in the district court may be tried by a judge pro tempore, who must be a member of the bar of the state, agreed upon in writing by the parties litigant, or their attorneys of record, approved by the court, and sworn to try the cause; and in such case any order, judgment or decree, made or rendered therein by such judge pro tempore, shall have the same force and effect as if made or rendered by the court with the regular judge presiding.

Section 37. Any judicial officer who shall absent himself from the state for more than sixty consecutive days shall be deemed to have forfeited his office.

APPENDIX B

THE CAUSES OF POPULAR DISSATISFACTION WITH THE ADMINISTRATION OF JUSTICE*

By Roscoe Pound

Dissatisfaction with the administration of justice is as old as law. Not to go outside of our own legal system, discontent has an ancient and unbroken pedigree. The Anglo-Saxon laws continually direct that justice is to be done equally to rich and to poor,¹ and the king exhorts that the peace be kept better than has been wont,² and that "men of every order readily submit . . . each to the law which is appropriate to him."³ The author of the apocryphal Mirror of Justice gives a list of one hundred and fifty-five abuses in legal administration, and names it as one of the chief abuses of the degenerate times in which he lived that executions of judges for corrupt or illegal decisions had ceased.⁴ Wyclif complains that "lawyers make process by subtlety and cavilations of law, civil, that is much heathen men's law, and do not accept the form of the gospel, as if the gospel were not so good as pagan's law."⁵ Starkey, in the reign of Henry VIII, says: "Everyone that can color reason maketh a stop to the best law that is beforetime devised."⁶ James I reminded his judges that "the law was founded upon reason, and that he and others had reason as well as the judges."⁷ In the eighteenth century, it was complained that the bench was occupied by "legal monks, utterly ignorant of human nature and of the affairs of men."⁸ In the nineteenth century the vehement criticism of the period of the reform movement needs only to be mentioned. In other words, as long as there have been laws and lawyers, conscientious and well-meaning men have believed that laws were mere arbitrary technicalities, and that the attempt to regulate the relations of mankind in accordance with them resulted largely in injustice. But we must not be deceived by this innocuous and inevitable discontent with all law into overlooking or under-rating the real and serious dissatisfaction with courts and lack of respects for law which exists in the United States today.

In spite of the violent opposition which the doctrine of judicial power over unconstitutional legislation at first

*Address delivered at annual convention of American Bar Association in 1906.

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encountered, the tendency to give the fullest scope to the common law doctrine of supremacy of law and to tie down administration by common law liabilities and judicial review, was, until recently, very marked. Today, the contrary tendency is no less marked. Courts are distrusted, and the executive boards and commissions with summary and plenary powers, freed, so far as constitutions will permit, from judicial review, have become the fashion. It will be assumed, then, that there is more than the normal amount of dissatisfaction with the present day administration of justice in America. Assuming this, the first step must be diagnosis, and diagnosis will be the sole purpose of this paper. It will attempt only to discover and to point out the causes of current popular dissatisfaction. The inquiry will be limited, moreover, to civil justice. For while the criminal law attracts more notice, the punishment seems to have greater interest for the lay mind than the civil remedies of prevention and compensation, the true interest of the modern community is in the civil administration of justice. Revenge and its modern outgrowth, punishment, belong to the past of legal history. The rules which define those invisible boundaries, within which each may act without conflict with the activities of his fellows in a busy and crowded world, upon which investor, promoter, buyer, seller, employer and employee must rely consciously or subconsciously in their everyday transactions, are conditions precedent of modern social and industrial organization.

With the scope of inquiry so limited, the causes of dissatisfaction with the administration of justice may be grouped under four main heads: (1) Causes for dissatisfaction with any legal system, (2) causes lying in the peculiarities of our Anglo-American legal system, (3) causes lying in our American judicial organization and procedure, and (4) causes lying in the environment of our judicial administration.

It needs but a superficial acquaintance with literature to show that all legal systems among all peoples have given rise to the same complaints. Even the wonderful mechanism of modern German judicial administration is said to be distrusted by the people on the time-worn ground that there is one law for the rich and another for the poor.⁹ It is obvious, therefore, that there must be some cause or causes inherent in all law and in all legal systems in order to produce this universal and invariable effect. These causes of dissatisfaction with any system of law I believe to be the following: (1) The necessarily mechanical operation of rules, and hence of laws, (2) the inevitable

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difference in rate of progress between law and public opinion, (3) the general popular assumption that the administration of justice is an easy task, to which anyone is competent, and (4) popular impatience of restraint.

The most important and most constant cause of dissatisfaction with all law at all times is to be found in the necessarily mechanical operation of legal rules. This is one of the penalties of uniformity. Legal history shows an oscillation between wide judicial discretion on the one hand and strict confinement of the magistrate by minute and detailed rules upon the other hand. From time to time more or less reversion to justice without law becomes necessary in order to bring the public administration of justice into touch with changed moral, social or political conditions. But such periods of reversion result only in new rules or changed rules. In time the modes of exercising discretion become fixed, the course of judicial action becomes stable and uniform, and the new element, whether custom or equity or natural law becomes as rigid and mechanical as the old. This mechanical action of the law may be minimized, but it cannot be obviated. Laws are general rules; and the process of making them general involves elimination of the immaterial elements of particular controversies. If all controversies were alike or if the degree in which actual controversies approximate to the recognized types could be calculated with precision, this would not matter. The difficulty is that in practice they approximate to these types in infinite graduations. When we eliminate immaterial factors to reach a general rule, we can never entirely avoid eliminating factors which will be more or less material in some particular controversy. If to meet this inherent difficulty in administering justice according to law we introduce a judicial dispensing power, the result is uncertainty and an intolerable scope for the personal equation of the magistrate. If we turn to the other extreme and pile up exceptions and qualifications and provisos, the legal system becomes cumbrous and unworkable. Hence the law has always ended in a compromise, in a middle course between wide discretion and over-minute legislation. In reaching this middle ground, some sacrifice of flexibility of application to particular cases is inevitable. In consequence, the adjustment of the relations of man and man according to these rules will of necessity appear more or less arbitrary and more or less in conflict with the ethical notions of individuals.

In periods of absolute or generally received moral systems, the contrast between legal results and strict ethical requirements will appeal only to individuals. In periods

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of free individual thought in morals and ethics, and especially in an age of social and industrial transition, this contrast is greatly intensified and appeals to large classes of society. Justice, which is the end of law, is the ideal compromise between the activities of each and the activities of all in a crowded world. The law seeks to harmonize these activities and to adjust the relations of every man with his fellow so as to accord with the moral sense of the community. When the community is at one in its ideas of justice, this is possible. When the community is divided and diversified, and groups and classes and interests, understanding each other none too well, have conflicting ideas of justice, the task is extremely difficult. It is impossible that legal and ethical ideas should be in entire accord in such a society. The individual looks at cases one by one and measures them by his individual sense of right and wrong. The lawyer must look at cases in gross, and must measure them largely by an artificial standard. He must apply the ethics of the community, not his own. If discretion is given him, his view will be that of the class from which he comes. If his hands are tied by law, he must apply the ethics of the past as formulated in common law and legislation. In either event, judicial and individual ethical standards will diverge. And this divergence between the ethical and the legal, as each individual sees it, makes him say with Luther, "Good jurist, bad Christian."¹⁰

A closely related cause of dissatisfaction with the administration of justice according to law is to be found in the inevitable difference in rate of progress between law and public opinion. In order to preclude corruption, to exclude the personal prejudices of magistrates, and to minimize individual incompetency, law formulates the moral sentiments of the community in rules to which the judgments of tribunals must conform. These rules, being formulations of public opinion, cannot exist until public opinion has become fixed and settled, and cannot change until a change of public opinion has become complete. It follows that this difficulty in the judicial administration of justice, like the preceding, may be minimized, but not obviated. In a rude age the Teutonic moots in which every free man took a hand might be possible. But these tribunals broke down under pressure of business and became ordinary courts with permanent judges. The Athenians conceived that the people themselves should decide each case. But the Athenian dikastery, in which controversies were submitted to blocks of several hundred citizens by way of reaching the will of the democracy, proved to register its caprice for the moment rather than its permanent will. Modern experience with

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juries, especially in commercial causes, does not warrant us in hoping much from any form of judicial referendum. Public opinion must affect the administration of justice through the rules by which justice is administered rather than through the direct administration. All interference with the uniform and automatic application of these rules, when actual controversies arise, introduces an anti-legal element which becomes intolerable. But, as public opinion affects tribunals through the rules by which they decide and these rules once made, stand till abrogated or altered, any system of law will be made up of successive strata of rules and doctrines representing successive and often widely divergent periods of public opinion. In this sense, law is often in very truth a government of the living by the dead.¹¹ The unconscious change of judicial law making and the direct alterations of legislation and codification operate to make this government by the dead reasonably tolerable. But here again we must pay a price for certainty and uniformity. The law does not respond quickly to new conditions. It does not change until ill effects are felt, often not until they are felt acutely. The moral or intellectual or economic change must come first. While it is coming, and until it is so complete as to affect the law and formulate itself therein, friction must ensue. In an age of rapid moral, intellectual and economic changes, often crossing one another and producing numerous minor resultants, this friction cannot fail to be in excess.

A third perennial source of popular dissatisfaction with the administration of justice according to law may be found in the popular assumption that the administration of justice is an easy task to which anyone is competent. Laws may be compared to the formulas of engineers. They sum up the experience of many courts with many cases enable the magistrate to apply that experience subconsciously. So, the formula enables the engineer to make use of the accumulated experience of past builders, even though he could not work out a step in its evolution by himself. A layman is no more competent to construct or to apply the one formula than the other. Each requires special knowledge and special preparation. None the less, the notion that anyone is competent to adjudicate the intricate controversies of a modern community contributes to the unsatisfactory administration of justice in many parts of the United States. The older states have generally outgrown it. But it is felt in extravagant powers of juries, lay judges of probate and legislative¹² or judicial law making against stare decisis, in most of the commonwealths of the South and West. The public seldom realizes how much it is interested in

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maintaining the highest scientific standard in the administration of justice. There is no more certain protection against corruption, prejudice, class feeling or incompetence. Publicity will avail something. But the daily criticism of trained minds, the knowledge that nothing which does not conform to the principles and received doctrines of scientific jurisprudence will escape notice, does more than any other agency for the everyday purity and efficiency of courts of justice.

Another necessary source of dissatisfaction with judicial administration of justice is to be found in popular impatience of restraint. Law involves restraint and regulation with the sheriff and his posse in the background to enforce it. But, however necessary and salutary this restraint, men have never been reconciled to it entirely. The very fact that it is a compromise between the individual and his fellows makes the individual, who must abate some part of his activities in the interest of his fellows, more or less restive. In an age of absolute theories, monarchical or democratic, this restiveness is acute. A conspicuous example is to be seen in the contest between the king and the common law courts in the seventeenth century. An equally conspicuous example is to be seen in the attitude of the frontiersman toward state-imposed justice. "The unthinking sons of the sage brush," says Owen Wister, "ill tolerate anything which stands for discipline, good order and obedience; and the man who lets another command him they despise. I can think of no threat more evil for our democracy, for it is a fine thing diseased and perverted, namely, the spirit of independence gone drunk."¹³ This is an extreme case. But in a lesser degree the feeling that each individual, as an organ of the sovereign democracy, is above the law he helps to make, fosters everywhere a disrespect for legal methods and institutions and a spirit of resistance to them. It is "the reason of this our artificial man the commonwealth," says Hobbes, "and his command that maketh law."¹⁴ This man, however is abstract. The concrete man in the street or the concrete mob is much more obvious: and it is no wonder that individuals and even classes of individuals fail to draw the distinction.

A considerable portion of current dissatisfaction with the administration of justice must be attributed to the universal causes just considered. Conceding this, we have next to recognize that there are potent causes in operation of a character entirely different.

Under the second main head, causes lying in our peculiar

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legal system. I should enumerate five: (1) The individualist spirit of our common law, which agrees ill with a collectivist age; (2) the common law doctrine of contentious procedure, which turns litigation into a game; (3) political jealousy, due to the strain put upon our legal system by the doctrine of supremacy of law; (4) the lack of general ideas or legal philosophy, so characteristic of Anglo-American law, which gives us pretty tinkering where comprehensive reform is needed, and (5) defects of form due to the circumstance that the bulk of our legal system is still case law.

The first of these, conflict between the individualist spirit of the common law and the collectivist spirit of the present age, has been treated of on another occasion.¹⁵ What was said then need not be repeated. Suffice it to point out two examples. From the beginning, the main reliance of our common law system has been individual initiative. The main security for the peace at common law is private prosecution of offenders. The chief security for the efficiency and honesty of public officers in mandamus or injunction by a taxpayer to prevent waste of the proceeds of taxation. The reliance for keeping public service companies to their duty in treating all alike at reasonable price is an action to recover damages. Moreover, the individual is supposed at common law to be able to look out for himself and to need no administrative protection. If he is injured through contributory negligence, no theory of comparative negligence comes to his relief; if he hires as an employee; he assumes the risk of the employment; if he buys goods, the rule is caveat emptor. In our modern industrial society, this whole scheme of individual initiative is breaking down. Private prosecution has become obsolete. Mandamus and injunction have failed to prevent rings and bosses from plundering public funds. Private suits against carriers for damages have proved no preventive of discrimination and extortionate rates. The doctrine of assumption of risk becomes brutal under modern conditions of employment. An action for damages is no comfort to us when we are sold diseased beef or poisonous canned goods. At all these points, and they are points of every-day contact with the most vital public interests, common law methods of relief have failed. The courts have not been able to do the work which the common law doctrine of supremacy of law imposed on them. A widespread feeling that the courts are inefficient has been a necessary result. But, along with this, another phase of the individualism of the common law has served to increase public irritation. At the very time the courts have appeared powerless themselves to give relief, they have seemed to obstruct public

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efforts to get relief by legislation. The chief concern of the common law is to secure and protect individual rights. "The public good," says Blackstone, "is in nothing more essentially interested than in the protection of every individual's private rights."¹⁶ Such, it goes without saying, is not the popular view today. Today we look to society for protection against individuals, natural or artificial, and we resent doctrines that protect these individuals against society for fear society will oppress us. But the common law guarantees of individual rights are established in our constitutions, state and federal. So that, while in England these common law dogmas have had to give way to modern legislation, in America they stand continually between the people, or large classes of the people; and the legislation they desire. In consequence, the courts have been put in a false position of doing nothing and obstructing everything, which it is impossible for the layman to interpret aright.

A no less potent source of irritation lies in our American exaggerations of the common law contentious procedure. The sporting theory of justice, the "instinct of giving the game fair play," as Professor Wigmore has put it, is so rooted in the profession in America that most of us take it for a fundamental legal tenet.¹⁷ But it is probably only a survival of the days when a lawsuit was a fight between two clans in which change of venue had been taken to the forum. So far from being a fundamental fact of jurisprudence, it is peculiar to Anglo-American law; and it has been strongly curbed in modern English practice. With us, it is not merely in full acceptance, it has been developed and its collateral possibilities have been cultivated to the furthest extent. Hence in America we take it as a matter of course that a judge should be a mere umpire, to pass upon objections and hold counsel to the rules of the game, and that the parties should fight out their own game in their own way without judicial interference. We resent such interference as unfair, even when in the interest of justice. The idea that procedure must of necessity be wholly contentious disfigures our judicial administration at every point. It leads the most conscientious judge to feel that he is merely to decide the contest, as counsel present it, according to the rules of the game, not to search independently for truth and justice. It leads counsel to forget that they are officers of the court and to deal with the rules of law and procedure exactly as the professional football coach with the rules of the sport. It leads to exertion to "get error into the record" rather than to dispose of the controversy finally and upon its merits. It turns witnesses, and especially expert witnesses

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into partisans pure and simple. It leads to sensational cross-examinations "to affect credit," which have made the witness stand "the slaughter house of reputations."¹⁸ It prevents the trial court from restraining the bullying of witnesses and creates a general dislike, if not fear, of the witness function which impairs the administration of justice. It keeps alive the unfortunate exchequer rule, dead in the country of its origin, according to which errors in the admission or rejection of evidence are presumed to be prejudicial and hence demand a new trial. It grants new trials because by inability to procure a bill of exceptions a party has lost the chance to play another inning in the game of justice.¹⁹ It creates vested rights in errors of procedure, of the benefit whereof parties are not to be deprived.²⁰ The inquiry is not, What do substantive law and justice require? Instead, the inquiry is, Have the rules of the game been carried out strictly? If any material infraction is discovered, just as the football rules put back the offending team five or ten or fifteen yards, as the case may be, our sporting theory of justice awards new trials, or reverses judgments, or sustains demurrers in the interest of regular play.

The effect of our exaggerated contentious procedure is not only to irritate parties, witnesses and jurors in particular cases, but to give to the whole community a false notion of the purpose and end of law. Hence comes, in large measure, the modern American race to beat the law. If the law is a mere game, neither the players who take part in it nor the public who witness it can be expected to yield to its spirit when their interests are served by evading it. And this is doubly true in a time which requires all institutions to be economically efficient and socially useful. We need not wonder that one part of the community strain their oaths in the jury box and find verdicts against unpopular litigants in the teeth of law and evidence, while another part retain lawyers by the year to advise how to evade what to them are unintelligent and unreasonable restrictions upon necessary modes of doing business. Thus the courts, instituted to administer justice according to law, are made agents or abettors of lawlessness.

Another source of irritation at our American courts is political jealousy due to the strain put upon our legal system by the doctrine of the supremacy of law. By virtue of this doctrine, which has become fundamental in our polity, the law restrains, not individuals alone, but a whole people. The people so restrained would be likely in any event to be jealous of the visible agents of restraint. Even more is this true in that the subjects which our constitutional

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polity commits to the courts are largely matters of economics, politics and sociology upon which a democracy is peculiarly sensitive. Not only are these matters made into legal questions, but they are tried as incidents of private litigation. This phase of the common law doctrine was felt as a grievance in the seventeenth century. "I tell you plainly," said Bacon, as attorney general, in arguing a question of prerogative to the judges, "I tell you plainly it is little better than a by-let or crooked creek to try whether the king hath power to erect this office in an assize between Brownlow and Mitchell."²¹ King Demos must feel much the same at seeing the constitutionality of the Missouri Compromise tried in an action of trespass, at seeing the validity of the legal tender laws tried on pleas of payment in private litigation, at seeing the power of the federal government to carry on the Civil War tried judicially in admiralty, at seeing income tax overthrown in a stockholders bill to enjoin waste of corporate assets and at seeing the important political questions in the Insular Cases disposed of in forfeiture proceedings against a few trifling imports. Nor is this the only phase of the common law doctrine of supremacy of law which produced political jealousy of the courts. Even more must the layman be struck with the spectacle of law paralyzing administration which our polity so frequently presents. The difficulties with writs of habeas corpus which the federal government encountered during the Civil War and the recent case of the income tax will occur to you at once. In my own state, in a few years we have seen a freight rate law suspended by decree of a court and have seen the collection of taxes from railroad companies, needed for the every-day conduct of public business, tied up by an injunction. The strain put upon judicial institutions by such litigation is obviously very great.

Lack of general ideas and absence of any philosophy of law, which has been characteristic of our law from the beginning and has been a point of pride at least since the time of Coke,²² contributes its mite also toward the cause of dissatisfaction with courts. For one thing, it keeps us in the thrall of a fiction. There is a strong aversion to straightforward change of any important legal doctrine. The cry is interpret it. But such interpretation is spurious. It is legislation. And to interpret an obnoxious rule out of existence rather than to meet it fairly and squarely by legislation is a fruitful source of confusion. Yet the Bar are trained to it as an ancient common law doctrine, and it has a great hold upon the public. Hence, if the law does not work well, says Bentham, with fine sarcasm, "it is never the law itself that is in the wrong;

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it is always some wicked interpreter of the law that has corrupted and abused it."²³ Thus another unnecessary strain is imposed upon our judicial system and courts are held for what should be the work of the legislature.

The defects of form inherent in our system of case law have been the subject of discussion and controversy too often to require extended consideration. Suffice it to say that the want of certainty, confusion and incompleteness inherent in all case law, and the waste of labor entailed by the prodigious bulk to which ours has attained, appeal strongly to the layman. The compensating advantages of this system, as seen by the lawyer and by the scientific investigator, are not apparent to him. What he sees is another phase of the great game; a citation match between counsel, with a certainty that diligence can rake up a decision somewhere in support of any conceivable proposition.

Passing to the third head, causes lying in our judicial organization and procedure, we come upon the most efficient causes of dissatisfaction with the present administration of justice in America. For I venture to say that our system of courts is archaic and our procedure behind the times. Uncertainty, delay and expense, and above all, the injustice of deciding cases upon points of practice, which are the mere etiquette of justice, direct results of the organization of our courts and the backwardness of our procedure, have created a deep-seated desire to keep out of court, right or wrong, on the part of every sensible business man in the community.

Our system of courts is archaic in three respects: (1) in its multiplicity of courts, (2) in preserving concurrent jurisdiction, (3) in the waste of judicial power which it involves. The judicial organizations of the several states exhibit many differences of detail. But they agree in these three respects.

Multiplicity of courts is characteristic of archaic law. In Anglo-Saxon law, one might apply to the Hundred, the Shire, the Witan, or the king in person. Until Edward I broke up private jurisdictions, there were the king's superior courts of law, the itinerant justices, the county courts, the local or communal courts and the private courts of lordships; besides which one might always apply to the king or to the Great Council for extraordinary relief. When later the royal courts had superseded all others, there were the concurrent jurisdictions of King's Bench, Common Pleas and Exchequer, all doing the same work, while appellate jurisdiction was divided

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by King's Bench, Eschequer Chamber and Parliament. In the Fourth Institute, Coke enumerates seventy-four courts. Of these, seventeen did the work that is now done by three, the County Courts, the Supreme Court of Judicature and the House of Lords. At the time of the reorganization by the Judicature Act of 1873, five appellate courts and eight courts of first instance were consolidated into the one Supreme Court of Judicature. It was the intention of those who devised the plan of the Judicature Act to extend the principle of unity of jurisdiction by cutting off the appellate jurisdiction of the House of Lords and by incorporating the County Courts in the newly formed Supreme Court as branches thereof.²⁴ The recommendations as to the County Courts was not adopted, and the appellate jurisdiction of the House of Lords was restored in 1875. In this way the unity and simplicity of the original design were impaired. But the plan, although adopted in part only, deserves the careful study of American lawyers as a model modern judicial organization. Its chief features were (1) to set up a single court of final appeal. In the one branch, the court of first instance, all original jurisdiction at law, in equity, in admiralty, in bankruptcy, in probate and in divorce was to be consolidated; in the other branch, the court of appeal, the whole reviewing jurisdiction was to be established. This idea of unification, although not carried out completely, has proved most effective. Indeed, its advantages are self-evident. Where the appellate tribunal and the court of first instance are branches of one court, all expense of transfer of record, or transcripts, bills of exceptions, writs of error and citations is wiped out. The records are the records of the court, of which each tribunal is but a branch. The court and each branch thereof knows its own records, and no duplication and certification is required. Again, all appellate practice, with its attendant pitfalls, and all waste of judicial time in ascertaining how or whether a case has been brought into the court of review is done away with. One may search the recent English reports in vain for a case where an appeal has miscarried on a point of practice. Cases on appellate procedure are wanting. In effect there is no such thing. The whole attention of the court and of counsel is concentrated upon the cause. On the other hand, our American reports bristle with fine points of appellate procedure. More than four percent of the digest paragraphs of the last ten volumes of the American Digest have to do with Appeal and Error. In ten volumes of the Federal Reporter, namely volumes 129 to 139, covering decisions of the Circuit Court of Appeals from 1903 until the present, there is an average of ten decisions upon points of appellate practice to the volume. Two cases to the volume, on the average, turn wholly upon appellate

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procedure. In the ten volumes there are six civil cases turning upon the question whether error or appeal was the proper mode of review, and in two civil cases the question was whether the Circuit Court of Appeals was the proper tribunal. I have referred to these reports because they represent courts in which only causes of importance may be brought. The state reports exhibit the same condition. In ten volumes of the Southwestern Reporter, the decisions of the Supreme Court and Courts of Appeals of Missouri show that nearly twenty percent involves points of appellate procedure. In volume 87, of fifty-three decisions of the Supreme Court and ninety-seven of the Court of Appeals, twenty-eight are taken up in whole or in part with the mere technics of obtaining a review. All of this is sheer waste, which a modern judicial organization would obviate.

Even more archaic is our system of concurrent jurisdiction of state and federal courts in causes involving diversity of citizenship; a system by virtue of which causes continually hang in the air between two courts, or, if they do stick in one court or the other, are liable to an ultimate overturning because they stuck in the wrong court. A few statistics on this point may be worth while. In the ten volumes of the Federal Reporter referred to, the decisions of the Circuit Court of Appeals in civil cases average seventy-six to the volume. Of these, on the average, between four and five in a volume are decided on points of federal jurisdiction. In a little more than one to each volume, judgments of Circuit Courts are reversed on points of jurisdiction. The same volumes contain on the average seventy-three decisions of Circuit Courts in civil cases to each volume. Of these, six, on the average, are upon motions to remand to the state courts, and between eight and nine are upon other points of federal jurisdiction. Moreover, twelve cases in the ten volumes were remanded on the form of the petition for removal. In other words, in nineteen and three-tenths percent of the reported decisions of the Circuit Courts the question was whether those courts had jurisdiction at all; and in seven percent of these that question depended on the form of the pleadings. A system that permits this and reverses four judgments a year because the cause was brought in or removed to the wrong tribunal is out of place in a modern business community. All original jurisdiction should be concentrated. It ought to be impossible for a cause to fail because brought in the wrong place. A simple order of transfer from one docket to another in the same court ought to be enough. There should be no need of new papers, no transcripts, no bandying of cases from one court to another on orders of removal and of demand, no beginnings again with new process.

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Judicial power may be wasted in three ways: (1) By rigid districts or courts or jurisdictions, so that business may be congested in one court while judges in another are idle, (2) by consuming the time of courts with points of pure practice, when they ought to be investigating substantial controversies, and (3) by nullifying the results of judicial action by unnecessary retrials. American judicial systems are defective in all three respects. The Federal Circuit Courts and Circuit Courts of Appeals are conspicuous exceptions in the first respect, affording a model of flexible judicial organization. But in nearly all of the states, rigid districts and hard and fast lines between courts operate to delay business in one court while judges in another have ample leisure. In the second respect, waste of judicial time upon points of practice, the intricacies of federal jurisdiction and the survival of the obsolete Chinese Wall between law and equity in procedure make our federal courts no less conspicuous sinners. In the ten volumes of the Federal Reporter examined, or an average of seventy-six decisions of the Circuit Courts of Appeals in each volume, two turn upon the distinction between law and equity in procedure and not quite one judgment to each volume is reversed on this distinction. In an average of seventy-three decisions a volume by the Circuit Courts, more than three in each volume involve this same distinction, and not quite two in each volume turn upon it. But many states that are supposed to have reformed procedure scarcely make a better showing.

Each state has to a great extent its own procedure. But it is not too much to say that all of them are behind the times. We struck one great stroke in 1848 and have rested complacently or contented ourselves with patchwork amendment ever since. The leading ideas of the New York Code of Civil Procedure marked a long step forward. But the work was done too hurriedly and the plan of a rigid code, going into minute detail, was clearly wrong. A modern practice act lays down the general principles of practice and leaves detail to rules of court. The New York Code Commission was appointed in 1847 and reported in 1848. If we except the Connecticut Practice Act of 1878, which shows English influence, American reform in procedure has stopped substantially where that commission left it. In England, beginning with 1826 and ending with 1874, five commissioners have put forth nine reports upon this subject.²⁵ As a consequence we have nothing in America to compare with the radical treatment of pleading in the English Judicature Act and the orders based thereon. We still try the record, not the case. We are still reversing judgments for nonjoinder and misjoinder. The English practice of joinder of parties

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against whom relief is claimed in the alternative, rendering judgment against any that the proof shows to be liable and dismissing the rest, makes an American lawyer rub his eyes. We are still reversing judgments for variance. We still reverse them because the recovery is in excess of the prayer, though subjoined by the evidence.²⁶

But the worst feature of American procedure is the lavish granting of new trials. In the ten volumes of the Federal Reporter referred to, there are, on the average, twenty-five writs of error in civil cases to the volume. New trials are awarded on the average in eight cases a volume, or nearly twenty-nine percent. In the state courts the proportion of new trials to causes reviewed, as ascertained from investigation of the last five columns of each series of the National Reporter system, runs over forty percent. In the last three volumes of the New York Reports (180-182), covering the period from December 6, 1904, to October 24, 1905, forty-five new trials are awarded. Nor is this all. In one case in my own state²⁷ an action for personal injuries was tried six times, and one for breach of contract²⁸ was tried three times and was four times in the Supreme Court. When with this we compare the statistics of the English Court of Appeal, which does not grant to exceed twelve new trials a year, or new trials in about three percent of the cases reviewed, it is evident that our methods of trial and review are out of date.

A comparison of the volume of business disposed of by English and by American courts will illustrate the waste and delay caused by archaic judicial organization and obsolete procedure. In England there are twenty-three judges of the High Court who dispose on the average of fifty-six hundred contested cases, and have before them, in one form or another, some eighty thousand cases each year. In Nebraska there are twenty-eight district judges who have no original probate jurisdiction and no jurisdiction in bankruptcy or admiralty, and they had upon their dockets last year forty-three hundred and twenty cases, of which they disposed of about seventy percent. England and Wales with a population in 1900 of 32,000,000, employs for the same civil litigation ninety-five judges, that is, thirty-seven in the Supreme Court and House of Lords and fifty-eight county judges. Nebraska, with a population in 1900 of 1,066,000, employs for the same purpose one hundred twenty-nine. But these one hundred and twenty-nine are organized on an antiquated system and their time is frittered away on mere points of legal etiquette.

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Finally, under the fourth and last head, causes lying in the environment of our judicial administration, we may distinguish six: (1) Popular lack of interest in justice, which makes jury service a bore and the vindication of right and law secondary to the trouble and expense involved; (2) the strain put upon law in that it has today to do the work of morals also; (3) the effect of transition to a period of legislation; (4) the putting of our courts into politics; (5) the making the legal profession into a trade, which has superseded the relation of attorney and client by that of employer and employee, and (6) public ignorance of the real workings of courts due to ignorant and sensational reports in the press. Each of these deserves consideration, but a few points only may be noticed. Law is the skeleton of social order. It must be "clothed upon by the flesh and blood of morality."²⁹ The present is a time of transition in the very foundations of belief and of conduct. Absolute theories of morals and supernatural sanctions have lost their hold. Conscience and individual responsibility are relaxed. In other words, the law is strained to do double duty, and more is expected of it than in a time when morals as a regulating agency are more efficacious. Another strain upon our judicial system results from the crude and unorganized character of American legislation in a period when the growing point of law has shifted to legislation. When, in consequence, laws fail to produce the anticipated effects, judicial administration shares the blame. Worse than this is the effect of laws not intended to be enforced. These parodies, like the common law branding of felons, in which a piece of bacon used to be interposed between the branding iron and the criminal's skin,³⁰ breed disrespect for law. Putting courts into politics, and compelling judges to become politicians, in many jurisdictions has almost destroyed the traditional respect for the Bench. Finally, the ignorant and sensational reports of judicial proceedings, from which alone a great part of the public may judge of the daily work of the courts, completes the impression that the administration of justice is but a game. There are honorable exceptions, but the average press reports distract attention from the real proceeding to petty tilts of counsel, encounters with witnesses and sensational by-incidents. In Nebraska, not many years since, the federal court enjoined the execution of an act to regulate insurance companies.³¹ In press accounts of the proceeding, the conspiracy clause of the bill was copied in extenso under the headline "Conspiracy Charged," and it was made to appear that the ground of the injunction was a conspiracy between the state officers and some persons unknown. It cannot be expected that the public shall form

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any just estimate of our courts of justice from such data.

Reviewing the several causes for dissatisfaction with the administration of justice which have been touched upon, it will have been observed that some inhere in all law and are the penalty we pay for local self-government and independence from bureaucratic control; that some inhere in the circumstances of an age of transition and are the penalty we pay for freedom of thought and universal education. These will take care of themselves. But too much of the current dissatisfaction has a just origin in our judicial organization and procedure. The causes that lie here must be heeded. Our administration of justice is not decadent. It is simply behind the times. Political judges were known in England down to the last century. Lord Kenyon, as Master of the Rolls, sat in Parliament and took as active a part in political squabbles in the House of Commons as our state judges today in party conventions.³² Dodson and Foggs and Sergeant Buzzfuzz wrought in an atmosphere of contentious procedure. Bentham tells us that in 1797, out of five hundred and fifty pending writs of error, five hundred and forty-three were shams of vexatious contrivances for delay.³³ Jarndyce and Jarndyce dragged out its weary course in chancery only half a century ago. We are simply stationary in that period of legal history. With law schools that are rivaling the achievements of Bologna and of Bourges to promote scientific study of the law; with active Bar Associations in every state to revive professional feeling and throw off the yoke of commercialism; with the passing of the doctrine that politics, too, is a mere game to be played for its own sake, we may look forward confidently to deliverance from the sporting theory of justice; we may look forward to a near future when our courts will be swift and certain agents of justice, whose decisions will be acquiesced in and respected by all.

APPENDIX B

NOTES

1. e.g. Secular Ordinance of Edgar, Cap. 1; Secular Ordinance of Cnut, 2; Laws of Ethelred, VI, 1; Laws of Edward, preface.
2. Laws of Athelstan, IV; Laws of Edward, 4.
3. Laws of Ethelred, V, 4.
4. Mirror, chap. 5, sec. 1.
5. See Maitland, English Law and the Renaissance, 53.
6. Id. 42.
7. Conference between King James I and the Judges of England, 12 Rep. 63.
8. Lord Campbell, Lives of the Chief Justice (3 Ed.) IV, 199.
9. Dr. v. Liszt, Professor at Berlin, delivered an address in the Rathaus in Berlin on this very subject recently, if we may credit press accounts.
10. Courtney Kenny, Bourns Jurista, Malus Christa, 19 Law Quart. Rev. 326.
11. Spencer, Principles of Sociology, II, 514.
12. See an instance noted in the address of Mr. Justice Brown, Rep. Am. Bar Assn., 1889, 282.
13. Quoted in Ross, Foundations of Sociology, 388.
14. Leviathan, chap. 26.
15. Do We Need a Philosophy of Law? 5 Columbia Law Rev. 339; The Spirit of the Common Law, Green Bag, January, 1906.
16. Bl. Comm. 139.
17. Wigmore, Evidence, 127.
18. Wigmore, Evidence, 1112.

19. Holland vs. Chicago, B&Q.R.R. Co., 52 Neb. 100.
20. De Graw vs. Elmore, 50 N.Y. 1.
21. Collectanea Juridica, 1, 173.
22. Co. Lit. Preface.
23. Fragment on Government, XVII.
24. Report of Judicature Commission, 1869, p. 13.
25. Lord Eldon's Commission, 1826; Royal Commission, 1829, 1830, 1831; Commission on Pleading and Practice in Courts of Common Law, 1851, 1853, 1860; Chancery Commissioners, 1852, 1854, 1856; Judicature Commissioners, 1869-1874.
26. Brought vs. Cherokee Nation (C.C.A.) 129 Fed. 192.
27. Omaha St. R. Co. vs. Boesen, 95 N.W. 617; Cf. Mutual Life Ins. Co. vs. Hillmon (C.C.A), 107 Fed 834 (tried six times).
28. Wittenberg vs. Molyneaux, 60 Neb. 107.
29. Sidgwick, Methods of Ethics, 6 Ed. 456.
30. Bentham, Theory of Legislation (tr. by Hildreth), 401.
31. Niagara Fire Ins. Co. vs. Cornell, 110 Fed. 816.
32. Lord Campbell, Lives of the Chief Justices, (3 Ed) IV, 70-73.
33. Works, VII, 214.

APPENDIX C

PRINCIPLES AND OUTLINES OF A MODERN UNIFIED COURT ORGANIZATION*

By Roscoe Pound

What are the general principles that should govern in the reorganization which will in reality be an organization of our courts? The controlling ideas should be unification, flexibility, conservation of judicial power, and responsibility. Unification is called for in order to concentrate the machinery of justice upon its tasks, flexibility in order to enable it to meet speedily and efficiently the continually varying demands made upon it, responsibility in order that some one may always be held, and clearly stand out as the official to be held, if the judicial organization is not functioning the most efficiently that the law and the nature of its tasks permit. Conservation of judicial power is a sine qua non of efficiency under the circumstances of the time. There are so many demands pressing upon the government for expenditure of public money that so costly a mechanism as the system of courts cannot justify needless and expensive duplications and archaic business methods. Moreover, waste of judicial power impairs the ability of courts to give to individual cases the thorough-going consideration that every case ought to have at their hands. Administrative organization of the entire system with responsible heads of each branch, department and division, and responsible superintending control of the whole, is quite as important as the reform of procedure upon which the profession and the public have concentrated their attention for a generation. I repeat what I said of procedural reform in 1909. Besides procedural reform there are a number of "other problems connected with the administration of justice in America which are equal, or even possibly of greater importance. Three of these problems have a direct and immediate relation to procedural reform, namely, the organization of courts, and, in consequence, the personnel, mode of choice and tenure of judges, and the organization, training and traditions of the bar. The importance of organization of the courts, of unification of the judicial system in order to obviate waste of judicial power, and of organization of the administrative business of courts, is something we are only beginning to perceive."

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As has been said in other connections, instead of setting up a new court for every new task we should provide an organization flexible enough to take care of new tasks when those to which they were assigned cease to require them. The principle must be not specialized courts but specialized judges, dealing with their special subjects when the work of the courts is such as to permit, but available for other work when the exigencies of the work of the courts require it. For two generations, at least, we have not fully utilized the judges of our courts, although we have often made them work very hard. Before adding more judges or more courts, we should be sure we are making the best and fullest use of those whom we have.

At the outset a caution is needed. Experience shows that even with the best of plans it is important not to go into much detail in authorizing or requiring certain courts. Recent constitutional amendments in some states have too much detail even for statutes. Continual legislative amendment of the statutes governing the organization and administration of the courts was the bane of judicial administration of justice in America in the last century. Certainly a constitution is not the place for details which, if they work badly, can only be removed or improved by the slow and sometimes painful process of constitutional amendment. Authority to set up a modern organization and responsibility for doing it and doing it effectively are the main points to be attended to.

With these general principles, let us turn to the general plan of organization. The whole judicial power should be concentrated in one court, which I would suggest might be called the Court of Justice of this or that state. Professor Walter F. Dodd proposed to call it the General Court of Justice. This court should be set up in three chief branches. To begin at the top, there should be a single ultimate court of appeal, which might be given the name which is most generally in use in this country, the supreme court. Second, there should be a superior court of general jurisdiction of first instance for all cases, civil and criminal, above the grade of small causes and petty offenses and violations of municipal ordinances. It should have numerous local offices where papers may be filed, and rules of court should arrange that these local offices, being offices for the whole court, may function for all branches or for one or more, as the exigencies of business demand. It is arguable whether this court should be organized in divisions, one for actions at law and other matters requiring a jury, or of that type, one for equity causes, and one for probate, administration,

guardianship, and the like. My own feeling would be that this would depend on the traditions of the state, the amount of business of each sort, and the conditions in localities, and should be left to rules of court to be determined in accord with experience. Divorce would be regarded in many jurisdictions as so serious a matter that it should be committed to this branch. On the other hand, there might be a sound reason for committing it to the third branch where a family court division, in large cities, might be better adapted to deal with all the incidents of difficulties in family relations. I should prefer to call this branch the superior court ... It is important that this branch be thought of and treated as one court for the whole state rather than a congeries of local separate courts. The term district court is too suggestive of a type of organization from which we must seek to get away.

At any rate, however this branch is organized, all the judges should be judges of the whole court. If they are chosen primarily for one or the other branch, as assigned to this or that division in some appropriate way by the administrative head, yet they should be eligible to sit in any other branch or division or locality, when called upon to do so, and it should be the duty of the appropriate administrative head to call upon them to go where work awaits to be done whenever the general state of business of the whole court makes that course advisable.

No doubt opinions will differ as to the proposal to include the tribunals for the disposition of causes of lesser magnitude in a plan for unification of the judicial system. But no tribunals are more in need of precisely this treatment. The amount of money involved has a direct relation to the amount of expense to which the law may reasonably subject litigants and thus may well determine to which branch of the court a case should be assigned. But it does not necessarily determine the difficulty of the case or the amount of learning and skill and experience which should be applied to determine it. Even small causes call for a high type of judge if they are to be determined justly as well as expeditiously. A judge dignified with the position and title of Judge of the Court of Justice of the State, assigned to the county courts, is none too good for cases which are of enough importance to the parties to bring to the court and hence ought to be important to a state seeking to do justice to all. It was the original plan of those who drew the judicature act in England to include the county courts in their scheme; but this part of the plan was not adopted. None the less, when one notes the extensive jurisdiction which is committed to the district courts in Massachusetts

and very generally to municipal courts, he must feel that the tribunals which would be included in the third branch have shown themselves worthy of inclusion.

As I said in the report of the American Bar Association in 1909, these courts have shown (if in view of the English county courts, it needed showing) that it is perfectly feasible to administer a much higher grade of justice in small causes than that formerly dispensed by justices of the peace, without resorting to the more expensive methods of the superior courts. The judges who are assigned to small causes should be of such caliber that they could be trusted and would command the respect and confidence of the public, so that there would be no need of retrial on appeal but review could be confined to ascertaining that the law was properly found and interpreted and applied. The further we can get away from the old justice of the peace idea for small causes the better.

Organization of Supreme Court

As to the first branch, the supreme court, while the head of the judicial system might well sit there, it should have its own head, immediately charged with responsibility for its proper functioning, since the chief justice, as I assume the head of the whole court will be called, will have much to do in exercising a superintending control over the entire system. According to rules of court and under his authority, perhaps in conference with the heads of the two branches, judges may be called from the superior court to sit in the supreme court, or vice versa, as the state of the dockets may require. It should be possible for the supreme court to sit in divisions if necessary to the prompt dispatch of business. When dockets are swollen, three judges ought to be enough for all but the most difficult and important cases. Thus there would be more time for oral argument, which with lawyers of the caliber of those who alone should appear in the highest court on cases of any consequence, is of the greatest assistance to the bench. Also there would be more time and opportunity for consultation and consideration of the merits of cases.

Administrative appeals are likely to become a large part of the work in our courts, if a simple, speedy, expeditious appellate procedure can be devised which will insure adherence to law and due process of law in hearings and determinations without substituting the discretion of the court for that of the administrative agency. As this type of work

increases, it may be advisable to set up a division to deal with it, and there should be a flexible organization and rule-making power adequate to find how to meet such situations as they arise.

The Statistical System

One of the functions of the head of the judicial system, but not necessarily of the head of the supreme court, should be to insure and direct the compilation of reliable and intelligently organized statistics of the administration of justice in the jurisdiction, and embody them in recommendations which with those of the judicial council might well make an annual report of much value for furthering the work of the courts both in their own state and in others. Certainly the earlier reports of the municipal court of Chicago, under the leadership of Chief Justice Olson, were of great use throughout the land in the formative period of such courts in the first three decades of the present century. Some of the judicial councils have been giving us well compiled and useful statistics. But there is much to be done in the way of working out a system of gathering, compiling and reporting them which will insure that they tell what needs to be told and give an accurate picture both as the basis of criticism and as the basis of legislation, of rulemaking, and of administrative regulations. To be of value they must be made upon a system which can be required of each and every tribunal and its clerks and administrative officers in the state. Only a unified judicial system with a responsible head and responsible heads of branches and divisions under him, can insure that this work is well done, and unless well done it is not worth doing at all.

The Superior Court

The second branch, the superior court, should be given complete jurisdiction of first instance, civil and criminal, the civil jurisdiction, for reasons set forth in preceding chapters, to include law, equity, and probate. Certainly there should be no mandatory setting off of these types of cases to separate divisions. But the organization of this branch should be so flexible that if experience showed good reason for setting off some or all of them in that way, it could be done by rule of court, or more simply by assigning cases to judges in such a way

as to effect a practical segregation, which, however, could be changed or revoked later if experience or changed conditions made such actions advisable.

This branch should be organized under a chief justice and in some states it might well be advisable to have regional subdivisions, each under a presiding judge, responsible to the chief justice of the superior court, as he would be responsible to the chief justice of the state. Rules of court would determine the times and places of sittings in the several counties, and all the judges, being judges of the one court, would be subject to be assigned where the demands of judicial business might make it advisable. Rules should provide for regional or local appellate terms according to the requirements of the court's business. Thus there would be no need of intermediate tribunals of any sort. As has been suggested in other connections, the procedure at these terms could be as simple as at the old hearings in the bank at Westminster after a trial at circuit. Three judges assigned to hold the term would pass on a motion for a new trial or judgment on or notwithstanding a verdict, or for modification or setting aside of findings and judgment accordingly (as at common law upon a special verdict). If, as I assume would be true, it proved necessary to limit the cases which could go thence to the supreme court, rules could restrict review to those taken by the highest court on certiorari. Even then, there need be nothing more in the nature of a double appeal than there is now in states where a motion for a new trial in the trial court is a necessary preliminary to review in the higher court. But heard before three judges at an appellate term it would not be a mere perfunctory step in review but a real hearing of the questions raised which should enable the case to stop there unless the points of law were serious enough to warrant certiorari.

Effective Reviewing

By hearing motions for new trials to set aside findings, or to render judgment notwithstanding verdicts or findings, or for modification or setting aside of decrees and orders, at such appellate terms, with no more formal or technical procedure than is involved in such motions made in a trial court today, not only would there be a simple and speedy means of reviewing the great bulk of the litigation in the court of general jurisdiction of first instance, but the plan would help rid us of the burdensome multiplication of reports which

has come with the setting up of intermediate appellate courts. It is felt that an appellate court, if only as a matter of dignity, must write opinions, and that its filed opinions must be published. There is no doubt a real function of an opinion is a check upon the bench, even if the decision adds nothing to the law. But that purpose and the further purpose of advising the court of review, if the case goes to the supreme court, would be served sufficiently by a memorandum of the questions decided and the grounds of decision.

Much time and energy are wasted in writing opinions in cases which involve no new questions or new phases of old questions. A brief statement of points and reasons will suffice both as a check and as an aid to the court above. Some such publication as the New York Miscellaneous Reports, under a qualified and responsible reporter, having no interest except to make the reports useful to the public and the profession, could select occasional memoranda worth reporting. It might well be at times that at county court appellate terms questions may come up and be decided which will deserve publication of the memoranda of grounds of decision. An energetic chief justice at the head of the judicial system, and energetic chiefs in the superior court and the county courts, with the aid of a judicial council, could devise rules to govern these things and if the courts or the bar, especially an integrated bar, were given control of reporting, one of the hard problems of the law and of the profession in America might be solved.

It would seem clear that three judges should be enough to sit at these terms. Benches of three have proved satisfactory in intermediate appellate courts in many states. If, however, it were felt that more should sit, either as a general practice or in some cases or classes of cases, the matter should be left open to be settled by rules of court in the light of experience.

Where, as in some jurisdictions, there are heavy criminal dockets, rules could set up criminal appellate terms for felony cases or county court appellate terms for misdemeanors with a flexible make-up, as in the English court of criminal appeal. From these appellate term cases should go directly to the supreme court by certiorari. There should be no retrial in the superior court of what has been tried in the county courts except as rules might provide for removal of exceptional cases by certiorari.

The County Court Branch

As to the county court branch, this, too, should be organized under the headship of a chief justice and perhaps in states of wide territorial extent, such as California and Texas, with regional presiding judges under him. Rules could set up municipal courts in large cities as branches of the county court, with power by rules to provide for juvenile and family and domestic relations and small cause courts as divisions, as they are needed. There should be appellate terms and causes could go from these terms to the Supreme Court by certiorari. Large metropolitan cities have peculiar needs which may make such divisional courts advisable. But while each municipal court should have an administrative head subject to the superintendence of the chief justice of the county court, there should be such complete flexibility of organization that judges could be taken from a municipal court to a rural county court or vice versa, or from these to the superior court or from the superior court to relieve congestion in the county court, as the state of work in the respective courts may require. It might be that in the municipal court in cities, rules could work out appellate terms for small causes with a simple inexpensive procedure so that the public could be persuaded that causes too small to justify retaining a lawyer were not for that reason neglected, and such terms might even have to be allowed by rule to review the whole case.

Powers of Chief Justice

Supervision of the judicial-business administration of the whole court should be committed to the chief justice, who should be made responsible for effective use of the whole judicial power of the state. Under rules of court he should have authority to make reassignments or temporary assignments of judges to particular branches or divisions or localities according to the amount of work to be done, and the judges at hand to do it. Disqualification, disability or illness of particular judges, or vacancies in office could be speedily provided for in this way. He should have authority also, under rules of court, to assign or transfer cases from one locality or court or division to another for hearing and disposition, as circumstances may require, so that judicial work may be equalized so far as may be and clogging up of particular dockets and accumulation of arrears prevented at the outset. He may require assistance in this

work of superintendence of the working of the court as a whole, and there should be authority to provide it. As it has been said, each of the branches, and where conditions require them, each division or regional organization within a branch, should have a responsible head, charged with the duty of immediate superintendence. Just as the chief justice should be held to see to it that the energies of the judiciary are fully and efficiently employed upon its tasks, so these heads of branches and divisions should each be responsible for efficient dispatch of the work of his organization. These are not matters for clerks, although clerks under proper direction and control may do much. They call for strong men with clear responsibility laid upon them to preclude their falling into prefatory routine or allowing abuses to grow up through their inertia.

It is but little less important to organize thoroughly the incidental non-judicial business of the court and all its branches and divisions. Legislation should not lay down details for this side of the administration of justice. As is now beginning to be done, competent business direction should be provided and the clerical and stenographic force be put under control and supervision of a responsible director. There very likely may have to be a like officer in each branch and major division or, if regional organization becomes necessary, each region. But it would be a mistake for legislation to go into much detail upon this subject. It is enough to settle the general principles and leave details to rules of court to be drawn up, altered and improved, with the aid of judicial councils, as experience shows defects and abuses and indicates the best way of dealing with them.

Emancipating the clerical work of the courts from politics and patronage and putting control of it where it ought to be, namely, in the courts themselves, must be an important item in any program of improving the administration of justice. To specify but one item, the system, or rather want of system, which prevails generally is a prolific source of needless expense in the courts.

Control of Clerical Force

Decentralization of courts was carried so far in the last century that the clerks were made independent functionaries, not merely beyond effective judicial control, but independent of any administrative supervision and guided only by legislative provisions and limitations. No one was charged with

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supervision of this part of the work of the courts. It was no one's business to look at it as a whole, seek to find how to make it more effective and to obviate waste and expense, and promote improvement. There is much unnecessary duplication, copying and recopying, and general prolixity of records in the great majority of our courts. In the clerical no less than on the judicial side most of our courts are like Artemus Ward's proposed military company in which every man was to be an officer and the superior of every other. The judiciary is the only great agency of government which is habitually given no control of its clerical force. Even the pettiest agency has much more control than the average state court. But scientific management is needed in a modern court no less than in a modern factory. With no one responsible there is no incentive to progress in the clerk's office. Much that could be done to reduce costs in litigation and the expense of operating the courts remains undone because it is no one's business to see it done. . . The established institutions of the past can maintain their claims to appropriations, in the face of this competition, only if they use to the best advantage the money appropriated to them . . . Organization of the non-judicial administrative business of the courts calls for complete and efficient supervision, under rules of court, which is best to be obtained by unification of the judiciary as a whole, with responsible headship, charged with supervision of the subordinate supervising and superintending officers.

Some of the things of which I could make just complaint twenty-five years ago, in a statement of what would be done away with by the kind of organization I am urging, have been remedied in the progress toward unification which has been going on. The bad practice of throwing cases out of court, to be begun over again in case they were brought in the wrong court, has been generally given up, or at least much modified. Yet transfer from one court to another at the cost of the appellant who has guessed wrong, after argument very likely, and perhaps construction of an indefinite or ambiguous statute, and it may be a difference of opinion between the court making the transfer and the one to which it is made, while an improvement, is not all that may be done in a program of reform. There ought to be no questions of jurisdiction under rigid constitutional or statutory provisions. Rules of court may deal with such situations fully and satisfactorily if they arise between branch and branch of the same court and are subject to superintending control of one official.

Principles of Administration

Moreover, enough obvious advantages remain to make full measure. For one thing, unification would result in a real judicial department as a department of government . . . In the states there are courts but there is no true judicial department . . . Again, unification of the judicial system would do away with the waste of judicial power involved in the organization of separate courts with constitutionally or legislatively defined jurisdictions and fixed personnel. Moreover, it would make it the business of a responsible official to see to it that such waste did not recur and that judges were at hand whenever and wherever work was at hand to be done. It would greatly simplify appeals to the great saving not only of the time and energy of appellate courts, but to the saving of time and money of litigants as well. An appeal could be merely a motion for a new trial, or for modification or vacation of the judgment, before another branch of the one court, and would call for no greater formality of procedure than any other motion. It would obviate conflicts between judges and courts of coordinate jurisdiction such as unhappily have too often taken place in many localities under a completely decentralized system which depends upon the good taste and sense of propriety of the individual judges, or appeal after some final order, when as like as not the mischief has been done, to prevent such occurrences. It would allow judges to become specialists in the disposition of particular classes of litigation without requiring the setting up for them of special courts.

In a unified court judges can be assigned permanently to the work for which they prove most fit without being drawn permanently from the judicial force so that they cannot be used elsewhere when needed. This is likely to be increasingly important. Specialization will probably become increasingly desirable in the future. But concurrent jurisdictions, jurisdictional lines between courts, with consequent litigation over the forms and venue at the expense of the merits, and judges who can do but one thing, no matter how little of that is to be done nor how much of something else, are not the way to promote efficient specialization. As cases of some class become numerous and require that a specialist pass upon them, judges or a judge would be designated for that purpose from the staff of the whole court, and the cases would be assigned to them in the one court in which all causes would be pending, even if in different branches or divisions, by some responsible functionary whose duty it would be to see to it

that the whole judicial power of the state was fully utilized to the best advantage. When judges make assignments among themselves the tendency to perfunctory routine and to follow the line of least resistance will keep up the practice of rapid periodical rotation which has been a bad feature of many courts.

Specialist Judges

Again, from time to time exceptional causes come before the courts in which it is desirable to assign the best talent for that sort of case that the staff of the court affords instead of leaving the case to the chance of what judge happens to be at hand at the time and place. This is especially true in certain homicide cases of special difficulty which do not always arise in places to which the best specialists for the trial of such cases must habitually be assigned. Power to assign and duty of assigning the most experienced and skillfull judge for such cases to the trial of the particular case may save much delay and expense and prevent miscarriage of justice. If it be said that there is danger of abuse of this power of assignment of a particular case, the answer must be that jockeying to get such cases before a particular judge in a rapidly rotating bench of judges is not unknown today, and that the power of assignment will be exercised by a functionary definitely pointed out as responsible and subject to responsible control by a superior of conspicuous position. Divided responsibility is no responsibility. Concentration of responsibility in a chief justice with corresponding power will correct, indeed will compel correction of, many abuses which have grown up because no one had the responsibility for preventing or removing them. Unless responsible headship for the whole judicial system is provided and given power to meet the exigencies of the responsibility, there is real danger that an administrative superintending control of the courts will be set up from without. This would not merely infringe the constitutional separation of powers. It would be a dangerous subjection of the courts to the executive at a time when executive hegemony has become a conspicuous feature of our policy.

The Judicial Council

There are two checks which may be relied upon to secure against abuse of the power which must be accorded the

responsible head of a unified court. One is his clearly defined responsibility both for what he does and lets his subordinates do and for what he omits to do. The other is the institution of the judicial council . . . Such councils exist now in an increasing number of states and are doing much for the improvement of the administration of justice in all parts of the land. Especially valuable reports have come from them in New York, Michigan, California, Massachusetts, New Jersey, and Kansas. The history, achievements and possibilities of judicial councils are not germane to the subject, however, and need not be pursued. It is enough in the present connection to point out that these councils, commonly made up of representatives of the bench, the bar, and representative lay citizens, consulting with the judges and advising and assisting them in the exercise of their rulemaking power, are certain to prove not only a stimulus to effective rising by the courts to their responsibilities, but also an effective and intelligent check upon abuses, which will be palpable to such men in their close contact with the work of the judges. It might be suggested, however, that with the unification of courts there might well come local councils for county and municipal courts, and that in states with an exceptionally large and diversified domain there might even be subordinate regional judicial councils. Moreover, a further check which will prove most effective is to be seen in the unified or integrated bar. With responsible organization of the lawyers, nothing could go very wrong without producing immediate action by the profession . . .

Courts Need Power

It should not be forgotten that where not hampered by legislative prescribing of details of organization and procedure, our courts have, on the whole, the best constructive record of any of our institutions. It was no mean task to develop an American law, a body of judicially found and judicially declared precepts suitable to America, out of the old English cases and old English statutes with the help of such books as Coke's Institutes and the more orderly but less detailed and thorough-going exposition by Blackstone. The task was well done in about three quarters of a century, so well, indeed, that the newer states as they became settled and admitted to the Union found their body of law substantially made for them. No other judicial achievement, and no legislative or administrative achievement in the English-speaking world, will compare with this.

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From the beginning of American law, however, the courts have been hampered by minute prescribing of detail in legislation. Control of their administrative agencies has been taken away from them. Their organization has been prescribed in extreme detail. Courts have been set up with rigid but ill-defined jurisdictional lines. Constitutions and statutes have prescribed successive or double appeals. In Indiana, the legislature even tried to take away from the Supreme Court the superintending control over the lower courts conferred upon it by the constitution. After the middle of the last century, the legislature in many states prescribed the minutiae of legal procedure, so that as Mr. Hornblower used to say of the New York code of civil procedure in its heyday, there was a rule for every action of the judge from the time he entered the court house except to prescribe the exact peg on which he should hang his hat. It is enlightening to compare the results in the substantive law, where the courts had a free hand, with those in procedure and the mechanics of justice where their hands were tied. The causes of popular dissatisfaction with the administration for very much the greater part lie in the mechanics of applying the substantive law by courts and judges--the use of a mechanism which has been put beyond judicial control and beyond effective judicial employment by constitutions and by detailed statutes carrying out the spirit of constitutional provisions.

Unification is Essential

Unification of the courts would go far to enable the judiciary to do adequately much which in desperation of efficient legal disposition by fettered courts, tied to cumbersome and technical procedure, we have been committing more and more to administrative boards and commissions. Ours is historically a legal polity and the balance of our institutions will be sadly disturbed if the courts lose their place in it. If they are to keep that place they must be organized to compete effectively with the newer administrative bodies.

We are told in the Federalist that the judiciary is least able to hold its own in a competition of the three departments of government. Judges are inhibited, with respect to the will to power, by the taught traditions which requires them to refer their action on all occasions to principles, to hew to precepts established in advance of action and to find the measure of decision by applying a traditional technique to predetermined premises. Their

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quest of ends is restricted by their habitual regard for means. The legislature and the executive are aggressive in their will to power. The judiciary do little more than obstruct when the department of government comes into conflict. There is nothing to be feared from making it efficient.

Unification of the courts will not do everything. There must be judges equal to their tasks and unafraid to do them. The mode of selection and tenure must be such as to insure such judges as far as may be. But no judges can achieve results such as are demanded today if they are held to the machinery of the last century. Things are done by the combined working of men and machinery. In that combination machinery is no negligible item. The right men will do much no matter what machinery is given them to work with. But our ideal must be the right men with the right machinery.

With the rulemaking power restored to them, with effective organization, with proper provisions as to selection and tenure, there is every reason to believe that the work of American courts in the period of development on which we have entered will be worthy of the beginning made without substantive law in the formative era.

APPENDIX D

JUDICIARY ARTICLE OF THE MODEL STATE CONSTITUTION OF THE NATIONAL MUNICIPAL LEAGUE*

INTRODUCTORY COMMENT

The judiciary article reflects, on the basis of additional experience, elaborations or modifications of principles established in earlier editions of the Model. Main emphasis is on establishment of a unified judicial system, free from a mass of separately established constitutional courts of frequently overlapping jurisdiction and free from constitutionally imposed rigidities and technical procedural difficulties which still characterize court structures.

When a great variety of separate courts are established by the constitution and when the jurisdiction of each is constitutionally defined, court reform often becomes either a matter of piecemeal constitutional amendment, or is not attempted at all because of the difficulties involved in integrating existing courts into any kind of rational scheme, or in abolishing courts whose judiciary and other personnel have obtained a vested interest in their continuation, even though they may have outlived their usefulness. This is especially true in many states in which the courts provide a major source of political patronage. A judicial system which lacks proper integration and unified administration is costly to the state because it is uneconomical to run and to the litigants because of the creation of procedural difficulties, delay and consequent added legal expenses.

The judiciary article emphasized the unity of the court system by establishing an integrated system with three levels of courts of general statewide jurisdiction. The system encompasses a general court expected to be the trial court, an appellate court expected to be the court of intermediate appeal and a supreme court expected to be the court of ultimate state appeal. Each of these except the supreme court may be divided into geographical departments, or into functional divisions, i.e., civil, criminal, domestic relations,

*National Municipal League, Model State Constitution, 6th ed. rev. 1968 (New York, 1963, 1968), pp. 77-91
Statements on derivation of the provisions have been omitted.

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probate, etc., as may be necessary. To avoid rigidities, the jurisdiction of each is not constitutionally defined but is left to be fixed by law except that in certain designated matters of constitutional importance--legislative districting and gubernatorial succession--the supreme court has original jurisdiction. The supreme court also has an express grant of appellate jurisdiction in cases raising constitutional issues under the state constitution or the Constitution of the United States. Inferior courts of limited jurisdiction may be established by the legislature, but a brake is placed on the haphazard establishment of a multitude of ill-coordinated lower courts by the requirement that all state courts must be uniform throughout the state. The lower courts, particularly when created by the constitution, have been especially troublesome in the reorganization of judicial systems.

In states with a relatively low volume of appellate business there may be no need for intermediate appeals, and all appeals could be taken from the trial court (general court) directly to the supreme court. In those states all reference to the intermediate appellate level could be omitted because the requirement of "due process" is certainly satisfied by the opportunity for one appeal from every decision. If the volume of appellate work is considerable, however, intermediate courts of appeal serve to expedite business and may be used, under appropriate rules of court, to operate as a sifting device so that only the truly major issues may be appealed to the supreme court. In the absence of a provision for an intermediate appellate tribunal, with appellate case loads increasing, some states have occasionally found it necessary to split the supreme court into two or more separate panels to dispose of more cases. Difficulties with this procedure may begin to arise, however, when conflicts in decisions require a hearing by the full court to avoid uncertainty in the law. When the volume of appellate work warrants the cost, a court of intermediate appeals should be authorized in the constitution.

The chief judge of the supreme court, as administrative head of the judicial system, may assign judges freely within each level of the court system and, for temporary service, he may assign judges from one level to another. In his housekeeping functions he is assisted by an administrative director whom he appoints with the approval of the supreme court. Further in aid of a unified administration and to advance flexibility of the system, the supreme court is granted power to make rules both to govern the administration of all courts and to govern practice and procedure in civil and criminal

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cases. These rules are to have the force of law and may be changed only by a two-thirds vote of all the members of the legislature.

The Model takes a firm position for an appointive judiciary holding office, after an initial term of seven years, during life or good behavior. There is considerable, if not unanimous, agreement that an appointive judiciary is preferable to an elective one because it enhances judicial independence and because a judicial candidate cannot--and usually does not--run for office in the same manner as candidates for legislative and executive office. Moreover, the attributes that make for good judicial qualifications and temperament are not appropriate subjects for meaningful public debate or for a considered vote of the electorate. The election of judges is thus commonly based on irrelevant considerations such as party label rather than on any considered judgment as to qualifications for judicial office. This is especially the case when a candidate runs for statewide judicial office in a large metropolitan center where he is not likely to be known by any substantial portion of the members of the bar, let alone by any substantial portion of the general public.

Because of the general dissatisfaction with a "straight" elective system of judicial selection, either partisan or non-partisan, many attempts have been made to gain the advantages of an appointive system while retaining the form of an elective one. This is true in varying degrees of the "Missouri Plan," the "Stimson Plan" and the plan in the fifth edition of the Model State Constitution (1948) which had been developed by the American Judicature Society. In every one of these plans, the designation of judicial candidates has been formalized in such a way as to make the subsequent election--be it to place a judge on the bench or to determine whether after service of a short initial term he is to be retained for a longer term--a less important part of the entire process because it only ratifies some prior screening of candidates.

It does not advance the aims of democratic self-government, of course, to retain the mere form of judicial election if the appointive features are the truly significant and determinative ones. Hence, two alternative provisions are proposed: The first, patterned on the federal system and on the systems in Hawaii and New Jersey, providing for gubernatorial appointment with the advice and consent of the legislature; and the second, patterned in part on the Missouri system and on that proposed by the American Bar Association and the American Judicature Society, providing

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for gubernatorial appointment from a list of names submitted by a separately constituted judicial nominating committee.

To enhance judicial independence further, office is to be held during good behavior after reappointment following an initial term of seven years. In this respect the Model follows the New Jersey constitution. In New Jersey, reappointment for life has been virtually automatic, but the initial term of seven years does permit the elimination of inefficient or unsuitable judges whose deficiencies would not suffice for removal for cause.

Section 6.01. Judicial Power. The judicial power of the state shall be vested in a unified judicial system, which shall include a supreme court, an appellate court and a general court, and which shall also include such inferior courts of limited jurisdiction as may from time to time be established by law. All courts except the supreme court may be divided into geographical departments or districts as provided by law and into functional divisions and subdivisions as provided by law or by judicial rules not inconsistent with law.

Comment

The words "unified judicial system," derived from the Puerto Rican constitution, have been chosen to express the intent of the article explicitly. Other sections carry out this intent by requiring that the jurisdiction of each of the courts "shall be uniform in all geographical departments or districts of the same court" (sec. 6.03); in providing for a single administrative head and organization for the entire system, and for freedom of assignment of judges at each level (sec. 6.05); in providing for a consolidated budget (sec. 6.06); and in authorizing the promulgation of a single set of rules to govern the promulgation of a single set of rules to govern the administration, practice and procedure of the courts (sec. 6.07).

States in which the volume of appellate litigation is comparatively light may wish to eliminate all references, in this and other sections, to the appellate court.

Although there is ample authority in section 6.01 for the establishment of inferior courts of limited jurisdiction, provision should not result in the uncontrolled and random development of multiple lower courts of diversified

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jurisdiction because section 6.03 imposes a requirement of uniformity of jurisdiction "in all geographical departments or districts of the same court." Thus, the principle of a unified judicial system has been extended into the lower court structure. In consequence, it is unlikely that more than one, or at the most two, statewide inferior courts of limited jurisdiction would be created.

The section authorized the division of all courts (other than the supreme court) into geographical departments or districts. These geographical divisions of the courts are to be made by law and are therefore expected to have some permanence--though they may, of course, be changed by law if the need should arise. The section also authorizes the division of the courts into "functional divisions and subdivisions" and provides that such functional divisions (i.e., civil, criminal, probate, domestic relations, etc.) may be created "by law or by judicial rules not inconsistent with law." This is expected to add a considerable measure of flexibility to the system, because it will enable the courts, by a simple change in the rules, to create, combine or abolish functional parts of courts so as to adapt the system promptly to changing needs and to the changing pressure of the volume of litigation in different areas of the law. It should be noted that section 6.03, which requires uniformity of jurisdiction in all geographical departments of the same court, does not require uniformity of jurisdiction of the functional divisions in different geographical departments. A general court sitting in, and with geographic jurisdiction over, a heavily populated city or metropolitan department would be able, therefore, to have a greater number and greater variety of functional parts than a largely rural department of the same court, where a relatively low volume of litigation might make such specialization of function useless and unnecessary.

Section 6.02. Supreme Court. The supreme court shall be the highest court of the state and shall consist of a chief judge and associate judges.

Comment

The section establishing the supreme court as the highest court of the state deliberately leaves blank the number of associate judges. The number "four", "six" or "eight" ought to be inserted, depending on a number of considerations. The object is to provide a supreme court with an odd number of judges, five to nine in number, so as to avoid, as far

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as possible, an even division of the court. As to the precise size, a balance must be struck between the desirable aims of having a tribunal large enough to assure an adequate range of views and yet not so large as to interfere with meaningful and close deliberation. A five-to nine-man court meets both aims. The volume of litigation likely to reach the highest tribunal should also be considered. Usually one judge is assigned the responsibility of writing the majority opinion and, unless the number of judges is adequate to share the burden, each judge will have to carry an excessive case load, which tends to produce delay, if not deterioration of the quality of written opinions. This, in turn, may have adverse effects on the legal system as a whole because inadequate opinions may fail to supply desired guidance to the lower courts.

A limiting consideration in setting the size is the expense of a large tribunal--which may well be a factor in smaller states. Aside from added judges' salaries, a larger tribunal can become quite costly if adequate staff services for each additional judge, such as law clerks and secretaries, and maintaining appropriate office accommodations are taken into account.

Section 6.03. Jurisdiction of Courts. The supreme court shall have appellate jurisdiction in all cases arising under this constitution and the Constitution of the United States and in all other cases as provided by law. It shall also have original jurisdiction in cases arising under subsections 4.04(b) and 5.08(e) of this constitution and in all other cases as provided by law. All other courts of the state shall have original and appellate jurisdiction as provided by law, which jurisdiction shall be uniform in all geographical departments or districts of the same court. The jurisdiction of functional divisions and subdivisions shall be as provided by law or by judicial rules not inconsistent with law.

Comment

In defining the jurisdiction of the courts, it has been the aim to permit complete flexibility consonant with the protection of the unified character of the judicial system and the special constitutional status of the supreme court. Hence, with the exceptions to be noted, all courts are to have original and appellate jurisdiction as provided by law, as long as such jurisdiction is uniform in all geographical departments of the same court. The jurisdiction of

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functional divisions may be set by law or by judicial rules not inconsistent with law, thus allowing diversity as between functional divisions of the same court in different geographical departments (see, in this connection, pertinent notes in sec. 6.01)

The special position of the supreme court is recognized in that it is expressly granted appellate jurisdiction in all cases "arising under this constitution and the Constitution of the United States," and original jurisdiction in matters of legislative districting and gubernatorial succession, subsections 4.04(b) and 5.08(e), which involve issues wherein a single and final adjudication seems best designed to meet the ends of justice without unnecessary delay. These special constitutional reservations of jurisdiction, both appellate and original, protect the supreme court against the possibility of legislative interference with the court's traditional and necessary power of judicial review. Without this special reservation of jurisdiction in constitutional cases, the legislature would be in a position to deny the supreme court the power to review state law or state action for compliance with state or federal constitutional requirements. The power of judicial review should be given express recognition in the state constitution not only because it is a traditional power of the courts but also because it is the most significant safeguard of American constitutional government.

Section 6.04. Appointment of Judges; Qualifications; Tenure; Retirement; Removal. (a) The governor shall appoint, with the advice and consent of the legislature, the chief judges and associate judges of the supreme, appellate and general courts. The governor shall give ten days' public notice before sending a judicial nomination to the legislature or before making an interim appointment when the legislature is not in session.

ALTERNATIVE: Subsection 6.04(a). Nomination by Nominating Commission. The governor shall fill a vacancy in the offices of the chief judges and associate judges of the supreme, appellate and general courts from a list of nominees presented to him by the appropriate judicial nominating commission. If the governor fails to make an appointment within sixty days from the day the list is presented, the appointment shall be made by the chief judge or by the acting chief judge from the same list. There shall be a judicial nominating commission for the supreme court and one commission for the nomination of judges for the

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court sitting in each geographical department or district of the appellate court. Each judicial nominating commission shall consist of seven members, one of whom shall be the chief judge of the supreme court, who shall act as chairman. The members of the bar of the state in the geographical area for which the court or the department or district of the court sits shall elect three of their number to be members of such a commission, and the governor shall appoint three citizens, not members of the bar, from among the residents of the same geographical area. The terms of office and the compensation for members of a judicial nominating commission shall be as provided by law. No member of a judicial nominating commission except the chief judge shall hold any other public office or office in any political party or organization, and no member of such a commission shall be eligible for appointment to a state judicial office so long as he is a member of such a commission and for [five] [three] [two] years thereafter.

(b) No person shall be eligible for judicial office in the supreme court, appellate court and general court unless he has been admitted to practice law before the supreme court for at least years. No person who holds judicial office in the supreme court, appellate court, or general court shall hold any other paid office, position of profit or employment under the state, its civil divisions or the United States. Any judge of the supreme court, appellate court or general court who becomes a candidate for an elective office shall thereby forfeit his judicial office.

(c) The judges of the supreme court, appellate court and general court shall hold their offices for initial terms of seven years and upon re-appointment shall hold their offices during good behavior. They shall be retired upon attaining the age of seventy years and may be pensioned as may be provided by law. The chief judge of the supreme court may from time to time appoint retired judges to such special assignments as may be provided by the rules of the supreme court.

(d) The judges of the supreme court, appellate court and general court shall be subject to impeachment and any such judge impeached shall

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not exercise his office until acquitted. The supreme court may also remove judges of the appellate and general courts for such cause and in such manner as may be provided by law.

(e) The legislature shall provide by law for the appointment of judges of the inferior courts and for their qualifications, tenure, retirement and removal.

(f) The judges of the courts of this state shall receive such salaries as may be provided by law, which shall not be diminished during their term of office.

Comment

(a) The Model follows a straight appointive system as in the federal judiciary, Hawaii and New Jersey, at least in courts of general jurisdiction. The reasons for the reliance on an appointive rather than an elective judiciary have been stated prominently in the general introduction to this article. The publicity given to judicial appointments by the governor will give great assurance of proper selections. It should be noted, too, that appointments initially will be for seven years, to be followed by reappointment for life. Thus, after initial appointments and reappointments, judicial appointments will become relatively infrequent so that considerable public attention can be given each. To allow for public discussion before a nomination is sent to the legislature for its consent, ten days' public notice is required.

The alternative provision also provides for appointment rather than election but requires the governor to make appointments from a list of nominees presented to him by the judicial nominating commission for the particular court. If the governor fails to make an appointment from the list submitted within 60 days, the chief judge makes an appointment from the same list. Separate judicial nominating commissions for the supreme court and for the judges of each court in each and every geographical department are provided for. Each judicial nominating commission is to consist of the chief judge, who is to be its chairman, and of three attorneys elected by all the members of the bar of the particular geographic area, and three citizens, residents of the area, not members of the bar, appointed by the governor. Members of judicial nominating

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commissions are to hold no other public office or party office and are to remain ineligible for judicial office while members in each and every geographical department are provided for. Each judicial nominating commission is to consist of the chief judge, who is to be its chairman, and of three attorneys elected by all the members of the bar of the particular geographic area, and three citizens, residents of the area, not members of the bar, appointed by the governor. Members of judicial nominating commissions are to hold no other public office or party office and are to remain ineligible for judicial office while members of the commission and for a number of years thereafter.

Alternative proposals for judicial appointment are presented because of a division of informed opinion. Proponents of gubernatorial appointment with the advice and consent of the legislature point to the success of the system in the federal judiciary and in the states which have adopted it. Critics of straight gubernatorial appointment concede it has generally resulted in better choices than have elective systems but claim party affiliation carries undue weight when left to the governor with the advice and consent of the legislature. The critics further contend that an appointive system could produce better judges if considerations of party affiliation were ruled out and if factors of experience and aptitude for judicial office were the sole considerations. The result of their criticism is, in the main, embodied in the alternative provision for gubernatorial appointment from among qualified names submitted by a nominating commission. Essentially, the provision included in the Model is a slight adaptation of what has become known as the Missouri-ABA Plan of judicial selection. The plan in its most recent form has been incorporated in a model judiciary article for state constitution approved by the ABA House of Delegates at its 1962 meeting and reproduced in the Journal of the American Judicature Society (April 1962), pages 280-282. This plan, by providing that every judge is "subject to approval or rejection by the electorate" every ten years, retains some formal aspects of electing the judiciary while at the same time making the nominating process the truly significant phase. The elective feature of the ABA Plan has not been adopted here for the reasons referred to earlier.

While it is true that the alternative tends to minimize considerations of party and while it is true that nominating commissions have an opportunity to investigate judicial qualifications in a more dispassionate and private manner than does the legislature, judicial nomination by commission raises a number of other questions.

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First, it should be noted that in a large state with many geographic divisions of the court system there may be dozens of nominating commission, with the chief judge of the supreme court chairman of each. This may impose a considerable burden upon him. The very fact of the number of nominating commissions as well as the fact that they will normally carry on their deliberations in private create additional problems. While local nominating commissions may be expected to know judicial candidates from their localities and while an examination of qualifications in private may give rise to worthwhile evaluations, the close local control combined with the secrecy of deliberation and the absence of public involvement may make it possible for nominations to be controlled by narrow, self-seeking cliques. Thus, while there can be little doubt that a judicial nominating commission for the supreme court will function well and honestly because of the great interest in its work, there may be some doubt as to whether the work of a judicial nominating commission in naming to judicial office a judge in a relatively obscure and small geographic department of the state's judicial system will engender the same degree of interest to avoid its deliberations from becoming concerned with partisanship of narrow regional or professional interests rather than with the benefit to the judicial system. If an interest in the quality of the judicial system and its judges is stimulated and maintained, a governor and a legislature dominated by the governor's party need not be overwhelming guided by considerations of party.

Each of the two systems proposed is likely to bring with it an improvement compared to an elective judiciary. Straight gubernatorial appointment with the advice and consent of the legislature recommends itself to the National Municipal League because of the high degree of visibility. The alternative recommends itself to members of the bar because of the more searching and private evaluation of judicial qualifications it makes possible. Given responsible administration, both appointive systems can be expected to improve the judiciary.

(b) Any number of years of practice of law between five and ten presumably would be a reasonable eligibility requirement. The provision includes a more or less standard conflict of employment clause prohibiting judges from holding other paid employment by the state, its divisions or the United States. Note that this would not exclude judges from purely honorific or unpaid positions, such as, for instance, members of school boards or other similar state or local

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agencies. The legislature would, of course, be free to bar judges from holding such unpaid positions. The subsection provides that judges who become candidates for elective office thereby forfeit judicial office in order to avoid even the appearance of judicial and political conflicts of interest. This is in line with the more recent state constitutions of Hawaii, Alaska and New Jersey.

(c) Although judicial life tenure is desirable to foster judicial independence, the initial term of seven years provides an opportunity to release judges who could not be dismissed on charges but who, nevertheless, are not thought worthy of a life term. It is the normal expectation that judges who have performed adequately will be reappointed for a full term. Retirement at age 70 is mandatory and the provision presumes that an adequate system of pensions for the judges will be established. Retired judges may be appointed for special assignments by the chief judge in accordance with the rules of the supreme court.

The intention of the retirement provision is to provide for compulsory retirement at a time of reduced capacity but to make it possible to use good talents and experience for special and temporary assignments.

(d) As a double check upon the honesty and efficiency of the judiciary, two methods for removal of judges are provided--impeachment and removal by the supreme court for cause. Since the supreme court may remove judges of the appellate and general court for cause, impeachment would not be normally used to remove judges of the latter courts. (In this connection, see Comment to sec. 4.19, Impeachment)

(e) As has been explained, these inferior courts will be uniform throughout the state.

(f) Judicial salaries are to be fixed by statute, the only limitation, which is intended to enhance judicial security and independence, being the requirement that a judge's salary may not be diminished during this term of office.

Section 6.05 Administration. The chief judge of the supreme court shall be the administrative head of the unified judicial system. He may assign judges from one geographical department or functional division of a court to another department or division of that court and he may assign judges for temporary service from one court to another. The chief judge shall, with the approval of the supreme court, appoint an

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administrative director to serve at his pleasure and to supervise the administrative operations of the judicial system.

Comment

A court system which administers justice and renders equitable decisions may nevertheless be inadequate if inefficient administration leads to confusion and congested court calendars lead to years of delay.

A court system consists of a great deal more than highly qualified judges. It is a large organization that employs many, sometimes thousands of, persons--clerks, bailiffs, stenographers, guards, probation officers, etc.--and maintains huge permanent files, systems of accounts for the collection of fines and fees, and it must provide a vast administrative machinery to keep court papers flowing in the proper channels. All this requires administrative oversight and, in an integrated court system, it also requires unified administrative planning at the top.

The chief judge of the supreme court, as the highest and most influential officer of the court system, logically should be the responsible administrative head. While, as in some states, he may be advised in matters of administration by some judicial council or conference, good administrative practice demands that a single officer have ultimate responsibility.

The chief judge of the supreme court is given the power to assign judges to serve where the need is greatest. This power is essential to equalize workloads and to prevent calendars from getting years behind in some parts of the state--usually metropolitan centers--while courts in other areas may be idle. The section limits the power of assignment to some extent in that assignment from a lower to a higher court or from a higher to a lower court may be for temporary service only. Thus an appellate court judge may be only temporarily assigned to serve as a trial court judge and vice versa. On each level, however, assignments may be made freely between geographic departments and between functional divisions.

Administration is a major responsibility and a chief judge who must also carry a full judicial load cannot discharge both functions without adequate assistance. An administrative director is therefore provided. The office has proved its value in a number of states. The duties of the administrative director usually will include the formulation of the consolidated

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budget, development of personnel standards and office procedures, collection of statistics and other responsibilities delegated by the chief judge.

Section 6.06. Financing. The chief judge shall submit an annual consolidated budget for the entire unified judicial system and the total cost of the system shall be paid by the state. The legislature may provide by law for the reimbursement to the state of appropriate portions of such cost by political subdivisions.

Comment

For improved management made possible by a unified judicial system, the state is to pay for the costs; thus doing away with the widespread practice of having separate local courts maintained and paid for locally. Since burdens may be greater in some parts of the state than in others, and in view of the fact that local sharing of costs may be part of a state's financial structure, the Model allows the legislature to provide for reimbursement to the state by political subdivisions of portions of the cost.

Section 6.07. Rule-making Power. The supreme court shall make and promulgate rules governing practice and procedure in civil and criminal cases in all courts. These rules may be changed by the legislature by a two-thirds vote of all members.

Comment

To place responsibility for judicial administration where it properly belongs, the supreme court is granted rule-making power. This means of judicial rule-making provides flexibility and adaptability whereas, when provisions for practice and procedure are provided by the legislature alone, they frequently become outmoded and unresponsive to the needs of the system. Where legislative promulgation of rules of practice and procedure is relied upon, such matters often are considered of relative unimportance in comparison to the pressures of substantive lawmaking. Needed changes fail to be adopted, less because of opposition than because the legislature is not sufficiently interested. To guard against untrammelled judicial rule-making, such as any possible

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tendency of rules to invade the area of substantive law, the legislature is granted authority to change them by special majority.

APPENDIX E

ABA MODEL STATE JUDICIAL ARTICLE (1962) *

Section 1. THE JUDICIAL POWER. The judicial power of the State shall be vested exclusively in one Court of Justice which shall be divided into one Supreme Court, one Court of Appeals, one Trial Court of General Jurisdiction known as the District Court, and one Trial Court of Limited Jurisdiction known as the Magistrates' Court.

Committee Comment

It is contemplated to set up by this section a single unified judicial system with a single court of original jurisdiction. This follows the recommendation of advocates of judicial reform from Pound to Vanderbilt. And this is one of the recommendations made by the American Bar Association in 1938. It is a reflection of the unfortunate experiences too many states have had with multiple courts of original jurisdiction.

Thirteen states with large populations and consequently with an extremely busy judicial system now provide for an intermediate appellate court. It is expected that more and more states will find this kind of a court to be a real aid in dealing with problems of congestion in the appellate system. The Model Judicial Article, therefore, provides for such a court.

The titles of the trial courts may, of course, vary from jurisdiction to jurisdiction. The ones chosen here are merely for purposes of example.

Section 2. THE SUPREME COURT.

Par. 1. Composition. The Supreme Court shall consist of the Chief Justice of the State and [four] [six] Associate Justices of the Supreme Court.

Committee Comment

The question of the number of justices is not one which has

*Prepared by the American Bar Association, Explanatory notes prepared by the Committee on a Model Judicial Article.

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an ideal solution and the number may vary from state to state. The experience of the United States Supreme Court would indicate that any number above nine has passed the point of diminishing returns. On the other hand, the number must be large enough to divide the tasks sufficiently to give the justices ample time for reflection and deliberation in the preparation of opinions.

The Committee is of the view that the number of justices should be fixed by the Constitution to avoid such suggestions as that of McReynolds when he was Attorney-General, adopted by President Franklin D. Roosevelt in his court-packing plan, to increase the number of justices in order to effect a change in the substance of the Court's opinion.

The Committee is of the opinion that the Supreme Court should not sit in divisions, but has not made provisions to prohibit it. Such a practice has been utilized by several state jurisdictions. Its main purpose is, of course, to allow the high court to increase the number of cases which it can hear in order to overcome or prevent delay and congestion. It must be recognized, however, that decisions by divisions, even if provided for by the Constitution, will not have the same force and effect as a decision of the whole Court. Moreover, sitting in divisions creates the possibility of minority views on the Court becoming controlling doctrine because of the accident of the make-up of a division. It is the Committee's belief, therefore, that while divisions could be utilized for clearing temporary congestion or delay, an intermediate appellate court and/or a limitation on the Supreme Court's appellate jurisdiction are more appropriate long-term remedies.

Par. 2. Jurisdiction.

A. Original jurisdiction. The Supreme Court shall have no original jurisdiction, but it shall have the power to issue all writs necessary or appropriate in aid of its appellate jurisdiction.

Committee Comment

It is the view of the Committee that no original jurisdiction be imposed on the high court. That court lacks facilities for the fact finding process inherent in every question of original jurisdiction. References to masters and referees, in the pattern of the United States Supreme Court, do not seem so adequate or desirable as requiring the case to enter the judicial system by way of the trial court.

Silence on the question of the issuance of writs has generally been interpreted as authorizing the Supreme Court to issue original writs. It is proposed to eliminate this power for the same reasons that call for the elimination of original jurisdiction. By way of its appellate jurisdiction, the high court can review all grants or denials of writs below and can properly, in the extraordinary cases, remove a case from the lower court to the high court even before judgment on the petition for the writ has been made by the lower court.

B. Appellate jurisdiction. Appeals from a judgment of the District Court imposing a sentence of death or life imprisonment, or imprisonment for a term of 25 years or more, shall be taken directly to the Supreme Court. In all other cases, criminal and civil, the Supreme Court shall exercise appellate jurisdiction under such terms and conditions as it shall specify in rules, except that such rules shall provide that a defendant shall have an absolute right to one appeal in all criminal cases. On all appeals authorized to be taken to the Supreme Court in criminal cases, that Court shall have the power to review all questions of law and, to the extent provided by rule, to review the sentence imposed.

Committee Comment

The only categories of cases in which the Committee felt that it was necessary to impose compulsory jurisdiction were those involving the life of the defendant and those involving liberty of the defendant for an extensive period of time. Most high courts now exercise this power in capital cases. For this purpose the Committee was unable to rationalize a distinction between capital cases and long-term sentences of imprisonment.

As to all other matters it was believed that the appellate power should be exercised in accordance with the demands of the times. On the question whether this allocation of power should be in the Court or in the legislature, the Committee chose the Court for several reasons. Among others, these reasons included: (1) the fact that such power in the Court would enhance the independence of the judiciary; (2) the fact that it would place the power to meet current problems in the hands of those most likely to be expert in the subject; (3) the fact that the rule making power was more flexible than the legislative power in its capacity to meet the demands of judicial administration.

The proposal that the appellate power in criminal cases include the power to review sentences is based on the efficacious use to which that power has been put by the Court of Criminal Appeals in England. Recognizing the possibility of undesirable imposition on the appellate process, the Committee thought it desirable to leave the Court with the power to limit the categories of cases in which sentences would be reviewed.

Section 3. THE COURT OF APPEALS. The Court of Appeals shall consist of as many divisions as the Supreme Court shall determine to be necessary. Each division of the Court of Appeals shall consist of three judges. The Court of Appeals shall have no original jurisdiction, except that it may be authorized by rules of the Supreme Court to review directly decisions of administrative agencies of the State and it may be authorized by rules of the Supreme Court to issue all writs necessary or appropriate in aid of its appellate jurisdiction. In all other cases, it shall exercise appellate jurisdiction under such terms and conditions as the Supreme Court shall specify by rules which shall, however, provide that a defendant shall have an absolute right to one appeal in all criminal cases and which may include the authority to review and revise sentences in criminal cases.

Committee Comment

The necessity for intermediate courts of appeal, already existent in thirteen states and likely to become necessary in others, was the reason the Committee felt that provision should be made in the Constitution for their creation. The primary function of such a court would be to hear appeals in cases which the Supreme Court should not be expected to handle because of the importance of its business. The jurisdiction of the court of appeals has, therefore, been framed in the same terms, except for the Supreme Court's compulsory jurisdiction, as is the jurisdiction of the Supreme Court itself. The same reasons exist for allotting the power to the Supreme Court rather than the legislature to specify the jurisdiction.

Section 4. THE DISTRICT AND MAGISTRATE'S COURTS.

Par. 1. Composition. The District Court shall be composed of such number of divisions and the District and Magistrate's Courts shall be composed of such number of judges as the Supreme Court shall determine to be necessary, except that each district shall be a geographic unit fixed by the

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Supreme Court and shall have at least one judge. Every judge of the District and Magistrate's Courts shall be eligible to sit in every district.

Committee Comment

The number of District Court judges and magistrates and District Court divisions must be flexible in order to allow for adjustment to new conditions. The authorization to provide for "divisions" was thought desirable in terms of the need for specialized courts, such as probate and divorce courts. But it was also thought to be desirable that these specialized courts be manned by judges whose functions need not be confined to such courts. Thus, all branches will be administered as one court with no conflicts of jurisdiction and no waste of judicial manpower.

The Committee believed that the Supreme Court would be the most expert body to decide how many judges and magistrates are required in each district.

The authority of a district judge and magistrate to sit in any district is complementary to the authority of the Chief Justice to assign judges anywhere in the most efficient use of judicial manpower.

Par. 2. District Court Jurisdiction. The District Court shall exercise general jurisdiction in all cases, except in so far as original jurisdiction may be assigned exclusively to the Magistrate's Court by the Supreme Court rules. The District Court may be authorized, by rule of the Supreme Court, to review directly decisions of State administrative agencies and decisions of Magistrate's Courts.

Par. 3. Magistrate's Court Jurisdiction. The Magistrate's Court shall be a court of limited jurisdiction and shall exercise original jurisdiction in such cases as the Supreme Court shall designate by rule.

Committee Comment

It was the Committee's view that cases involving minor matters such as traffic offenses and small claims should be delegated to magistrate's courts, and that this would be necessary to avoid an unreasonably large number of district

judges with general original jurisdiction. It was also thought that where the districts covered a large geographic area or temporary congestion occurred in any district, magistrates might appropriately be used to relieve the district court of undue burdens. Because of the need for flexibility in the use of such courts it was deemed best to leave the terms and conditions of the magistrate's court jurisdiction in the control of the Supreme Court by rule.

Section 5. SELECTION OF JUSTICES, JUDGES AND MAGISTRATES.

Par. 1. Nomination and Appointment. A vacancy in judicial office in the State, other than that of magistrate, shall be filled by the governor from a list of three nominees presented to him by the Judicial Nominating Commission. If the governor should fail to make an appointment from the list within sixty days from the day it is presented to him, the appointment shall be made by the Chief Justice or the Acting Chief Justice from the same list. Magistrates shall be appointed by the Chief Justice for a term of three years.

Committee Comment

The method of selecting judicial officers of all but the lowest courts here proposed follows essentially the American Bar Association plan proposed recommended in 1937. The provision directing the Chief Justice to appoint where the governor fails to act is designed to prevent a stalemate between the governor and the nominating commission which has occurred in States using this system.

The importance of removing the process of judicial nomination from the political arena is probably the most essential element in any scheme for adequate judicial reform.

Because the exigencies of the calendar will vary so much, the Committee thought that great freedom was necessary in the appointment of magistrates. This meant a necessity for rapid appointment and comparatively short tenure. The power of appointment was, therefore, placed in the Chief Justice. It was also felt, however, that the tenure had to be long enough to attract competent lawyers to accept appointment.

Par. 2. Eligibility. To be eligible for nomination as a justice of the Supreme Court, Judge of the Court of Appeals, Judge of the District Court, or to be appointed as a Magistrate, a person must be domiciled within the State, a citizen of the United States, and licensed to practice law in the courts of the State.

Committee Comment

The requirements of citizenship and membership in the bar are those which are usually demanded in the States. The Committee is of the view that no other qualifications should be specified. The selection procedure will provide all other necessary safeguards, at the same time allowing the nominating commission the broadest opportunity to secure nominees of the highest calibre.

Section 6. TENURE OF JUSTICES AND JUDGES.

Par. 1. Term of Office. At the next general election following the expiration of three years from the date of appointment, and every ten years thereafter, so long as he retains his office, every justice and judge shall be subject to approval or rejection by the electorate. In the case of a justice of the Supreme Court, the electorate of the entire State shall vote on the question of approval or rejection. In the case of judges of the Court of Appeals, and the District Court, the electorate of the districts or district in which the division of the Court of Appeals or District Court to which he was appointed is located shall vote on the question of approval or rejection.

Committee Comment

This provision also follows the American Bar Association plan. The periods between appointment and election and between election and re-election have no ideal duration. They must be long enough to permit the character of the judge's work to become known, long enough so that competent persons will not reject appointment for fear of hasty rejection by the electorate. But it must be short enough to remove reasonably promptly judges who are not performing their functions adequately.

Par. 2. Retirement. Every justice and judge shall retire at the age specified by statute at the time of his appointment, but that age shall not be fixed at less than sixty-five years. The Chief Justice is empowered to authorize retired judges to perform temporary judicial duties in any court of the State.

Committee Comment

Most States have a fixed retirement age. The Committee is of

the opinion that the legislature should be free to fix a retirement age, so long as it does not reduce it below sixty-five.

The Committee has reluctantly chosen a fixed retirement age rather than indefinite tenure because it is of the view that the interests of sound administration of justice will be better served by the possibility of retiring competent judges than by risking the continuance in office of judges with truly limited capacities.

Par. 3. Retirement for Incapacity. A justice of the Supreme Court may be retired after appropriate hearing, upon certification to the governor, by the Judicial Nominating Commission for the Supreme Court that such justice is so incapacitated as to be unable to carry on his duties.

Committee Comment

This provision follows the Alaska plan to have an independent body make the determination whether a high court judge has become incapacitated while in office. The nominating commission seems to be a logical agency to charge with this responsibility. The difficulties which seem to arise when this power is put in the hands of fellow judges are avoided by this process.

Par. 4. Removal. Justices of the Supreme Court shall be subject to removal by the impeachment process. All other judges and magistrates shall be subject to retirement for incapacity and to removal for cause by the Supreme Court after appropriate hearing. No justice, judge, or magistrate shall, during his term of office, engage in the practice of law. No justice, judge, or magistrate shall, during his term of office, run for elective office other than the judicial office which he holds, or directly or indirectly make any contribution to, or hold any office in, a political party or organization, or take part in any political campaign.

Committee Comment

The first two sentences of this section derive from the New Jersey and Puerto Rican Constitution. The impeachment process is not utilized with reference to lower court judges, because it is the Committee's view that the Supreme Court,

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in its supervisory capacity over the judicial system, is better qualified and the more logical body to determine the issues than is the legislature.

The last two sentences are for the purpose of requiring that the judge devote his full time to his job as judge and to remove all judges from politics to the extent possible. Several jurisdictions have had the sorry spectacle of a judge running for the governorship, accepting contributions from lawyers, etc., while retaining his judicial office.

Certainly this is conduct unbecoming a judicial officer and hardly compatible with the idea of the safeguarding the judicial system from political ravages. The last clause of the last sentence is taken from the Missouri Judicial Article Par. 29 No. f.

Section 7. COMPENSATION OF JUSTICES AND JUDGES.

Par. 1. Salary. The salaries of justices, judges, and magistrates shall be fixed by statute, but the salaries of the justices and judges shall not be less than the highest salary paid to an officer of the executive branch of the State government other than the governor.

Committee Comment

Certainly one of the greatest drawbacks to securing an adequate judiciary has been the niggardly salaries which most of the States pay to their judicial officers. While the Committee was cognizant of the fact that the Constitution of the State is not the appropriate place to fix salaries in terms of dollars and cents, it was the hope of the Committee that the lower limit set forth in this section would afford some base for more adequate compensation for judges.

Par. 2. Pensions. Provision shall be made by the legislature for the payment of pensions to justices and judges and their widows. In the case of justices and judges who have served ten years or more, and their widows, the pension shall not be less than fifty percent of the salary received at the time of the retirement or death of the justice or judge.

Committee Comment

Again, the Committee understood that the pension program could

not be spelled out in the Constitution. It has endeavored nevertheless to fix a floor on such pensions so that the requirement of a pension does not become meaningless.

Par. 3. No Reduction of Compensation. The compensation of a justice, judge or magistrate shall not be reduced during the term for which he was elected or appointed.

Committee Comment

This is the usual provision for the protection of judicial independence by removing the legislative power to reduce the salaries of judges while in office. Without such a provision all attempts to secure tenure of office would be futile.

Section 8. THE CHIEF JUSTICE.

Par. 1. Selection and Tenure. The Chief Justice of the State shall be selected by the Judicial Nominating Commission from the members of the Supreme Court and he shall retain that office for a period of five years, subject to reappointment in the same manner, except that a member of the court may resign the office of Chief Justice without resigning from the court. During a vacancy in the office of Chief Justice, all powers and duties of that office shall devolve upon the member of the Supreme Court who is senior in length of service on that court.

Committee Comment

Many alternatives presented themselves on the question of the proper agency for appointing the Chief Justice. The Committee sought an agency outside the Court itself to avoid contributing to politics and factions within the Court. To avoid political intervention, the power was not vested in the governor. The nominating commission was thought to be the most knowledgeable and non-political alternative. Tenure of office was also thought necessary to the effective functioning of the judicial administration of the courts of the State. The evils of constant rotation of the office of Chief Justice have been only too cogently demonstrated by experience.

Par. 2. Head of Administration Office of the Courts. The Chief Justice of the State shall be the executive head of the judicial system and shall appoint an administrator of the courts and such assistants as he deems necessary to aid

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the administration of the courts of the State. The Chief Justice shall have the power to assign any judge or magistrate of the State to sit in any court in the State when he deems such assignment necessary to aid the prompt disposition of judicial business, but in no event shall the number of judges and justices exceed the number of justices provided in section 2. The administrator shall, under the direction of the Chief Justice, prepare and submit to the legislature the budget for the court of justice and perform all other necessary administrative functions relating to the courts.

Committee Comment

The vesting of administrative authority in the Chief Justice follows the recommendation of the American Bar Association. The desirability of the concept has been proved by the experience in the New Jersey system which adopted such a method of administering its courts.

Section 9. RULE MAKING POWER. The Supreme Court shall have the power to prescribe rules governing appellate jurisdiction, rules of practice and procedure, and rules of evidence, for the judicial system. The Supreme Court shall, by rule, govern admission to the bar and the discipline of members of the bar.

Committee Comment

The vesting of the rule making power in the Supreme Court has long been an objective of those interested in judicial reform. This is another of the recommendations of the American Bar Association. Rule making power over all the courts of the States is already exercised to a large degree in 28 States. Several states provide that the judicial council should fulfill this function, but the Committee thinks that the Supreme Court, because of its responsibility for the operation of the judicial system, is the proper body of experts to advise it in the formulation of rules.

The provision giving to the Supreme Court the power to promulgate rules of evidence is a more controversial issue than the other rule making powers. In only eight states does the Supreme Court have control over rules of evidence, and in most of these states the power is conferred by statute rather than by the Constitution. The Committee follows the recommendation of the American Bar Association as most consistent with the proper concept of rules of evidence as procedural

and most conducive to the effective administration of justice in the court system.

The last sentence of Section 9 contains language broad enough to authorize the Supreme Court to deal with either an integrated or an unintegrated bar of the State in connection with supervision of its members, discipline of its members, and other regulation or supervision of the bar. The language is broad enough to permit the Supreme Court to order an integrated state bar to be organized as was done in Wisconsin. If it is preferred that an integrated bar be a constitutionally created corporation, the following sentences may be added to Section 9.

"The State Bar of _____ is a public corporation, having, as an agency of the Supreme Court, perpetual existence and succession. Membership in it shall be a condition precedent to practicing law in this State. The Supreme Court by appropriate orders may provide for its organization and its regulation and supervision."

Section 10. JUDICIAL NOMINATING COMMISSION. There shall be a Judicial Nominating Commission for the Supreme Court and one for each division of the Court of Appeals and the District Court. Each Judicial Nominating Commission shall consist of seven members, one of whom shall be the Chief Justice of the State, who shall act as chairman. The members of the bar of the State residing in the geographic area for which the court or division sits shall elect three of their number to serve as members of said commission, and the governor shall appoint three citizens, not admitted to practice law before the courts of the State, from the residents of the geographic area for which the court or division sits. The terms of office and compensation for members of a Judicial Nominating Commission shall be fixed by the legislature, provided that not more than one-third of a commission shall be elected in any three-year period. No member of a Judicial Nominating Commission shall hold any other public office or office in a political party or organization and he shall not be eligible for appointment to a State judicial office so long as he is a member of a Judicial Nominating Commission and for a period of five years thereafter.

Committee Comment

The proposed Judicial Nominating Commission also follows the American Bar Association plan, which recommended that the list of nominees be made by an independent agency. The make-up of

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the Commission could be a combination of a number of variables.

The Committee feels, however, that no group should have fixed representation and that all appropriate interests in the State can be represented through appointments as provided in this section. Provision is made for the participation of non-lawyers in the selection process. The disqualifications are self-explanatory.

APPENDIX F

THE MISSOURI PLAN (MERIT SELECTION)*

Section 29 (a). Courts subject to plan - appointments to fill vacancies. Whenever a vacancy shall occur in the office of judge of any of the following courts of this state, to wit: The supreme court, the courts of appeals, the circuit and probate courts within the city of St. Louis and Jackson county, and the St. Louis courts of criminal correction, the governor shall fill such vacancies by appointing one of three persons possessing the qualifications for such office, who shall be nominated and whose names shall be submitted to the governor by a nonpartisan judicial commission established and organized as hereinafter provided.

Section 29 (b). Adoption of plan in other circuits. At any general election the qualified voters of any judicial circuit outside of the city of St. Louis and Jackson county, may by a majority of those voting on the question elect to have the judges of the courts of record therein appointed by the governor in the manner provided for the appointment of judges to the courts designated in section 29 (a). The general assembly may provide the manner in which the question shall be submitted to the voters.

Section 29 (c). (1) Tenure of judges - declarations of candidacy - forms of judicial ballot - re-election and retention. Each judge appointed pursuant to the provisions of sections 29 (a) - (g) shall hold office for a term ending December 31st following the next general election after the expiration of twelve months in the office. Any judge holding office, or elected thereto, at the time of the election by which the provisions of sections 29 (a) - (g) become applicable to this office, shall, unless removed for cause, remain in office for the term to which he would have been entitled had the provisions of sections 29 (a) - (g) not become applicable to his office. Not less than sixty days prior to the holding of the general election next preceding the expiration of his term of office, any judge whose office is subject to the provisions of sections 29 (a) - (g) may file in the office of the secretary of state a declaration of candidacy for election to succeed himself. If a declaration is not so filed by any judge, the vacancy resulting from the expiration of his term of office shall be filled by appointment as herein provided.

*Missouri Const. Art. 5, Sec. 29 (1940).

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If such a declaration is filed, his name shall be submitted at said next general election to the voters eligible to vote within the geographic jurisdictional limit of his court, or circuit if his office is that of circuit judge, on a separate judicial ballot, without party designation, reading:

"Shall Judge
(Here the name of the judge shall be inserted)
of the
(Here the title of the court shall be inserted)
Court be retained in office? Yes No."
(Scratch one)

If a majority of those voting on the question vote against retaining him in office, upon the expiration of his term of office, a vacancy shall exist which shall be filled by appointment as provided in section 29 (a); otherwise, said judge shall unless removed for cause, remain in office for the number of years after December 31st following such election as is provided for the full term of such office, and at the expiration of each such term shall be eligible for retention in office by election in the manner here prescribed.

Section 29 (c). (2). Certification of names upon declarations - law applicable to elections. Whenever a declaration of candidacy for election to succeed himself is filed by any judge under the provisions of this section, the secretary of state shall not less than thirty days before the election certify the name of said judge and the official title of his office to the clerks of the county courts, and to the boards of election commissioners in counties or cities having such boards, or to such other officials as may hereafter be provided by law, of all counties and cities wherein the question of retention of such judge in office is to be submitted to the voters, and, until legislation shall be expressly provided otherwise therefor, the judicial ballots required by this section shall be prepared, printed, published and distributed, and the election upon the question of retention of such judge in office shall be conducted and the votes counted, canvassed, returned, certified and proclaimed by such public officials in such manner as is now provided by the statutory law governing voting upon measures proposed by the initiative.

Section 29 (d). Nonpartisan judicial commissions - number, qualification, selection and terms of members - majority rule - reimbursement of expenses - rules of supreme court. Nonpartisan judicial commissions whose duty it shall be to nominate and submit to the governor names of persons for appointment as provided by sections 29 (a) - (g) are hereby established and shall be organized on the following basis: For vacancies in

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the office of judge of the supreme court or of any court of appeals, there shall be one such commission, to be known as "The Appellate Judicial Commission"; for vacancies in the office of judge of any other court of record subject to the provisions of section 29 (a) - (g), there shall be one such commission, to be known as "The Circuit Judicial Commission," for each judicial circuit which shall be subject to the provisions of each judicial circuit which shall be subject to the provisions of section 29 (a) - (g); the appellate judicial commission shall consist of seven members, one of whom shall be the chief justice of the supreme court, who shall act as chairman, and the remaining six members shall be chosen in the following manner: The members of the bar of this state residing in each court of appeals district shall elect one of their number to serve as a member of said commission, and the governor shall appoint one citizen, not a member of the bar, from among the residents of each court of appeals district shall elect one of their number to serve as a member of said commission, and the governor shall appoint one citizen, not a member of the bar, from among the residents of each court of appeals district, to serve as a member of said commission; each circuit judicial commission shall consist of five members, one of whom shall be the presiding judge of the court of appeals of the district within which the judicial circuit of such commission or the major portion of the population of said circuit is situated, who shall act as chairman, and the remaining four members shall be chosen in the following manner: The members of the bar of this state residing in the judicial circuit of such commission shall elect two of their number to serve as members of said commission, and the governor shall appoint two citizens, not members of the bar, from among the residents of said judicial circuit, to serve as members of said commission; the terms of office of the members of such commission shall be fixed by the supreme court and may be changed from time to time, but not so as to shorten or lengthen the term of any member then in office. No member of any such commission other than the chairman shall hold any public office, and no member shall hold any official position in a political party. Every such commission may act only by the concurrence of a majority of its members. The members of such commissions shall receive no salary or other compensation for their services as such, but they shall receive their necessary traveling and other expenses incurred while actually engaged in the discharge of their official duties. All such commissions shall be administered, and all elections provided for under this section shall be held and regulated, under such rules as the supreme court shall promulgate.

Section 29 (e). Payment of expenses. All expenses incurred in administering sections 29 (a) - (g), when approved by the

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supreme court, shall be paid out of the state treasury. The supreme court shall certify such expense to the state auditor, who shall draw his warrant therefor payable out of funds not otherwise appropriated.

Section 29 (f). Prohibition of political activity by judges. No judge of any court of record in this state, appointed to or retained in office in the manner prescribed in sections 29 (a) - (g), shall directly or indirectly make any contribution to or hold any office in a political party or organization, or take part in any political campaign.

Section 29 (g). Self-enforcibility. All of the provisions of sections 29 (a) - (g) shall be self-enforcing except those as to which action by the general assembly may be required.

APPENDIX G

JUDICIAL SYSTEM PROPOSED BY THE ADVISORY COMMISSION ON
INTERGOVERNMENTAL RELATIONS

Source: Advisory Commission on Intergovernmental Relations,
Legislative Program: New Proposals For 1972, Report M-67
(Washington: U.S. Government Printing Office, 1972), pp. 1-23.

ACIR JUDICIAL SYSTEM

JUDICIAL CONSTITUTIONAL ARTICLE

A substantial part of the disorganization in most State-local criminal justice systems stems from the confused character of the judicial process. Too often judicial systems suffer from lack of centralized court administration, wide disparities in the qualifications for and conduct in judicial office, overly cumbersome procedures for judicial retirement and discipline and an over reliance on partisan methods of judicial selection.

Judicial reform in these matters needs to be of a constitutional and statutory nature. The separation of powers necessitates the drafting of a model constitutional article that will be the basis for statutory court reforms. The following draft constitutional article provides the fundamental construct for (1) a unified court system under the central direction of a Supreme Court and the chief justice, (2) uniform rules concerning judicial conduct, (3) modernized procedures for judicial retirement, removal, and discipline, and (4) "merit" selection of judges.

State judicial constitutional reform has enjoyed considerable support in the past three decades. Beginning with thorough reforms in Missouri in 1945 and New Jersey in 1947 and building on the model constitutions of Alaska and Hawaii in 1959, a number of other States have revised their constitutional judicial articles. Among such States are California (1966), Colorado (1966), Illinois (1962), Michigan (1964), Nebraska (1962, 1966), New Mexico (1966, 1967), New York (1961), and Oklahoma (1967). This model constitutional article is derived from the various provisions of the Alaska, California, Hawaii, Illinois, Missouri, Nebraska, and New Jersey constitutions as well as the model judicial constitutional articles of the American Bar Association and the National Municipal League.

Suggested Constitutional Judicial Article

1 *Section 1. The Judicial Power.* The judicial power of the state is vested in [a unified judicial
2 system] [one Court of Justice], which shall include a Supreme Court, [a Court of Appeals,] a Trial
3 Court of General Jurisdiction, the geographic divisions of which shall be District Courts, [and special
4 subdivisions of the Trial Court of General Jurisdiction known as Courts of Limited Jurisdiction].
5 All courts except the Supreme Court may be divided into geographic districts and into functional
6 divisions and subdivisions as provided by law or by judicial rules not inconsistent with the law. The
7 several courts shall have original and appellate jurisdiction as provided by law.

8 *Section 2. Court Administration.* The chief justice of the Supreme Court shall be the execu-
9 tive head of the judicial system and shall appoint, with the approval of the Supreme Court, an
10 administrator and such assistants as the administrator deems necessary to supervise the administration
11 of the courts of the state. The chief justice with the approval of the Supreme Court, may [assign
12 judges from one court or division thereof to another] [assign judges to any court in the state] in order
13 to aid in the prompt disposition of judicial business.

14 *Section 3. Rule Making Power.* The Supreme Court shall adopt rules governing the adminis-
15 tration, practice and procedure in all courts. These rules may be changed by the legislature by a

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1 [majority] [two-thirds] vote of the members elected to each house.

2 *Section 4. Judicial Rules of Conduct.* (a) The Supreme Court shall adopt rules of conduct for
3 all judges.

4 (b) All judges shall devote full time to judicial duties. They shall not, while in office, engage in
5 the practice of law or other gainful employment. They shall not hold any other public office under
6 the United States, this state or its civil divisions. They also shall not directly or indirectly make any
7 contribution to, or hold any office in, a political party or organization.

8 *Section 5. Commission on Judicial Qualifications.* The legislature shall establish a Commission
9 on Judicial Qualifications. The Commission may recommend to the Supreme Court the removal,
10 retirement, or discipline of any judge who the Commission finds is physically or mentally incapable
11 of performing his judicial duties, or who has persistently failed to perform his judicial duties or whose
12 other conduct has been prejudicial to the administration of justice.

13 *Section 6. Judicial Nominating Commissions.* The legislature shall establish a judicial nomi-
14 nating commission for the Supreme Court and for each geographic division of [the Court of Appeals
15 and] the Trial Court of General Jurisdiction. All judges shall be appointed initially by the Governor
16 from a list of nominees submitted by the appropriate judicial nominating commission. Each judge
17 shall stand for retention in office on a ballot which shall submit the question of whether he should
18 be retained in judicial office for the prescribed term.

ACIR JUDICIAL SYSTEM

OMNIBUS JUDICIAL ACT

This nation's State-local judicial systems suffer from a number of serious administrative, structural, and fiscal maladies. Court systems in most States are highly fragmented, lack central administrative direction, exhibit disparate rules of practice and procedure, have cumbersome and unprofessional procedures for judicial selection, discipline, removal, and retirement, and are often faced with a critical lack of funding. The result is too often a disorganized, inefficient judicial system.

To rectify this situation, 18 States have unified their court systems, 35 States have instituted a central court administrator, 17 States use the Missouri Plan for selection and appointment of judges; 18 States use judicial qualifications commissions to scrutinize the performance of incumbent judicial personnel; four States have assumed all judicial costs and 22 States provide for compulsory judicial retirement on or after the age of 70. All these State reforms have resulted in a more efficient and manageable judiciary.

The omnibus judicial bill is divided into ten titles. Title I sets forth the purpose and definitions of the act. Title II delineates the structure of a unified judicial system and provides for the organization and jurisdiction of the supreme court, court of appeals, and trial courts of general and limited jurisdiction. The chief justice is made executive head of the judicial department, and the supreme court or the legislature may organize the geographical divisions of the court of appeals and the trial courts of general and limited jurisdiction.

Title III structures the administrative responsibility for court operation. Part A creates a three-tiered hierarchy of judicial administration making departmental justices and chief judges responsible to the chief justice for the conduct of court business. Part B provides for professional court administrators at all levels to aid chief judicial personnel in their management responsibilities. The office of the State court administrator centralizes management responsibilities at the highest judicial level and should be a guiding force in effecting more uniform court procedures, more flexible assignment of court personnel, and more continuous scrutiny of the operations of the judicial system as a whole. The appellate and general trial court administrators provide similar guidance in other courts.

Title IV confers upon the chief justice assignment power over judicial personnel and Title V centralizes judicial rule-making power in the supreme court and the chief justice.

Title VI specifies the qualifications for judicial office and the method of judicial selection. It authorizes the creation of judicial nominating commissions that shall select nominees for appointment to any judicial vacancy. Procedures for nonpartisan election of judges so appointed are also set forth.

Title VII provides for the promulgation of a canon of judicial ethics, full-time service for judges, and the institution of a judicial qualifications commission to scrutinize the performance of incumbent judges. The judicial qualifications commission may recommend to the supreme court the (i) involuntary retirement of judges due to mental or physical disability which hinders their judicial performance or (ii) the removal or discipline of judges whose conduct may be deemed prejudicial to the administration of justice.

Title VIII mandates State assumption of court finances and the institution of centralized budget and personnel procedures for the judicial system. Title IX makes judicial retirement mandatory at the age of 70. It also sets forth, in general terms, other conditions of retirement for judicial department personnel.

Title II is modelled after Connecticut, Idaho, and Vermont laws on judicial organization. Title III

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is derived from statutes of the over 30 States that have central court administrators. Titles IV and V are adapted from Puerto Rico and Hawaii law respectively.

Title VI on "merit" selection of judges is adapted from Missouri and Nebraska laws.

Title VII on judicial conduct is designed after California Supreme Court rules as well as Idaho, Nebraska, and Oregon laws on the subject.

Title VIII is modelled after Colorado law and parts of Title IX are adapted from Maine legislation.

Suggested Legislation

TITLE I

PURPOSE AND DEFINITIONS

Section 1. Purpose. The purpose of this act is to: (i) create a unified court system, subject to central direction by the chief justice and the supreme court, (ii) to institute a corps of professional court administrators to assist the chief justice and judicial associates in matters of court administration, (iii) to provide modernized procedures of judicial retirement and discipline, (iv) promulgate uniform rules on judicial conduct and judicial qualifications, (v) to provide for "merit" selection of judicial personnel, and (vi) to mandate state assumption of all court finances.

Section 2. Definitions. As used in this act:

(1) "Judicial department" means the judicial branch of the state government.

(2) "Judge" means any duly appointed or elected presiding judicial officer in the state.

(3) "Chief justice" means the chief justice of the state supreme court.

(4) "Director" means the head of the administrative office of the courts.

(5) "Departmental justice" means the judicial administrative head of a judicial circuit.

(6) "Administrator" means the general trial court administrator of each judicial district.

(7) "Member of the state bar" means any person admitted to the practice of law in this state.

(8) "Nonjudicial personnel" means all employees of the judicial department who do not hold the post of judge.

[(9) "Judicial circuit" means a geographical division of the state court of appeals.]

(10) "Judicial district" means a geographical division of the state general trial court

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TITLE II

JUDICIAL DEPARTMENT ORGANIZATION AND STRUCTURE

1 *Section 1. General Plan of Organization.* The judicial department of the state shall consist of a
2 supreme court, [a court of appeals and] a statewide general trial court and such subdivisions of the
3 general trial court to be known as trial courts of limited jurisdiction as [the supreme court may estab-
4 lish] [may be established by law]. The executive head of the judicial department shall be the chief
5 justice of the supreme court. The territorial jurisdiction of all courts in the judicial department shall
6 be coextensive with the boundaries of the state.

7 *Section 2. Supreme Court Organization.* There shall be one supreme court which shall be the
8 highest court of the state and shall consist of a chief justice and [] associate justices.

9 *Section 3. Supreme Court Jurisdiction.* The supreme court shall have final appellate jurisdic-
10 tion. Appeals to the supreme court from the [court of appeals] [general trial court] are a matter of
11 right if a question under the Constitution of the United States or of this state arises for the first time
12 in and as a result of the action of the [court of appeals] [general trial court] or if the [court of
13 appeals] [general trial court] certifies that a case decided by it involves a question of such impor-
14 tance that the case should be decided by the supreme court except that a defendant shall have an
15 absolute right to one appeal in all criminal cases. On all appeals authorized to be taken to the su-
16 preme court in criminal cases, that court shall have the power to review all questions of law and, to
17 the extent provided by rule, to review and revise the sentence imposed.

18 [Section 4. *Organization of the Court of Appeals.* The court of appeals shall consist of as
19 many geographical divisions known as judicial circuits as [the supreme court shall from time to time
20 determine to be necessary] [may be established by law]. Each judicial circuit of the court shall
21 consist of one chief judge and [] associate judges. The court shall sit at the times and places pre-
22 scribed by [the rules of the supreme court] [the chief justice].]

23 [Section 5. *Jurisdiction of the Court of Appeals.* Appeals from final judgments of a general
24 trial court are a matter of right to the court of appeals in the judicial circuit in which the general trial
25 court is located except in (a) criminal cases directly appealable to the supreme court and (b) criminal
26 cases where there has been an acquittal. The court of appeals shall exercise appellate jurisdiction in
27 all other cases under such terms and conditions as the supreme court shall specify by rule.]

28 *Section 6. General Trial Court Organization.* There shall be one general trial court having
29 statewide jurisdiction. The general trial court shall consist of as many geographical divisions as [the
30 supreme court shall from time to time determine to be necessary] [as may be established by law]

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1 [The boundaries of judicial districts shall be contained within the judicial circuits in the state.] The
2 supreme court shall designate the principal office in each district and shall also designate the chief
3 judge of each district court. The court may hold sessions anywhere in its geographical area where
4 adequate facilities exist for the disposition of court business. It shall hold continuous sessions or be
5 in session as often as the chief justice finds that the caseload of each district requires.

6 *Section 7. Jurisdiction of General Trial Court.* The general trial court shall have original juris-
7 diction, subject to appeal and exceptions by the supreme court.

8 *Section 8. Trial Courts of Limited Jurisdiction.* (a) The supreme court may authorize the es-
9 tablishment of trial courts of limited jurisdiction as functional subdivisions of the general trial court.
10 These courts shall be under the general direction of the chief judge of the judicial district of which they
11 are a part.

12 (b) [These courts shall exercise jurisdiction in such cases as the supreme court may designate
13 by rule.] [These courts shall exercise original jurisdiction in the case of criminal misdemeanors and
14 violations of municipal ordinances.]

TITLE III

COURT ADMINISTRATION

PART A

JUDICIAL ADMINISTRATORS

1 *Section 1. Chief Justice as Executive Head of Courts.* The chief justice shall be the executive
2 head of the judicial department and be responsible for the efficient operation thereof, for the expedi-
3 tious dispatch of litigation therein, and for the proper conduct of business in all courts. The chief jus-
4 tice may require reports from all courts in the state and may issue rules and regulations as may be nec-
5 essary for the efficient operation of the courts and the prompt and proper administration of justice.

6 [Section 2. *Departmental Justices.* The chief justice shall appoint from the ranks of all
7 [appellate and] general trial court judges a departmental justice for each judicial circuit in the state.
8 Departmental justices shall be responsible to the chief justice for the efficient operation of courts in
9 their circuits. The departmental justice shall be assisted in his duties by an appeals court
10 administrator.]

11 *Section 3. Chief Judges.* Every general trial court district shall have a chief judge selected
12 from the judges in the district by the [departmental justice in the circuit in which the district is
13 located] [chief justice]. The chief judge shall be responsible to the [departmental justice] [chief

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1 justice] for the efficient operation of the courts in his district. Each chief judge shall be assisted in
2 his duties by a general trial court administrator as directed by the [departmental justice] [chief
3 justice].

4 *Section 4. Administrative Powers of Chief Justice.* The chief justice of the supreme court may:

5 (1) assign or reassign all judicial department personnel to any court in the state as described in
6 title IV of this act.

7 (2) exercise powers of general financial management as detailed in title VIII of this act

8 (3) exercise all other powers as the supreme court shall deem necessary to insure the proper
9 administration of justice.

PART B

STATE COURT [COURT OF APPEALS,] AND GENERAL TRIAL COURT ADMINISTRATORS

1 *Section 1. Creation of the Office.* There is hereby established a state office known as the
2 administrative office of the courts. It shall be supervised by a director who shall be appointed by the
3 chief justice to serve at his pleasure. The director may appoint assistants and other employees
4 necessary for the performance of duties of the office.

5 *Section 2. Qualifications of the Director, Compensation of Employees.* The director and other
6 personnel shall have whatever qualifications as may be prescribed by [law] [the supreme court]
7 provided that no personnel in the office shall be engaged directly or indirectly in the practice of law
8 nor hold any other office or employment. The compensation of the director shall be [prescribed by
9 law]. [The director shall fix the compensation of the personnel under his supervision.]

10 *Section 3. Powers and Duties.* The director, under the direction of the chief justice, shall:

11 (1) carry on a continuous survey and study of the organization, operation, condition of busi-
12 ness, practice and procedure of the judicial department and make recommendations to the chief
13 justice concerning the number of judges, other judicial personnel, and prosecutors required for the
14 efficient administration of justice.

15 (2) examine the status of the dockets of all courts so as to determine cases and other judicial
16 business that have been delayed beyond [] months and make reports thereon. From such reports,
17 the director shall indicate which courts are in need of additional judicial personnel and make recom-
18 mendations to the chief justice concerning the assignment or reassignment of personnel to courts
19 that are in need of such personnel. The director shall also carry out the directives of the chief justice
20 as to the assignment or reassignment of personnel in these instances.

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(3) investigate complaints with respect to the operation of the courts.

(4) examine the statistical systems of the courts and make recommendations for a uniform system of judicial statistics. The director shall also collect and analyze statistical and other data relating to the business of the courts.

(5) prescribe uniform administrative and business methods, systems, forms, and records to be used in all state courts.

(6) assist in preparing assignment calendars of all judges and attend to the printing and distribution thereof.

(7) implement standards and policies set by the chief justice regarding hours of court, the assignment of term parts, judges and justices, and the publication of judicial opinions.

(8) act as fiscal officer of the courts and in so doing:

(i) maintain fiscal controls and accounts of funds appropriated for the judicial system,

(ii) prepare all requisitions for the payment of state monies appropriated for the maintenance and operation of the judicial system;

(iii) prepare budget estimates of state appropriations necessary for the maintenance and operation of the judicial system and make recommendations with respect thereto;

(iv) collect statistical and other data and make reports to the chief justice relating to the expenditures of public monies [, both state and local,] for the maintenance and operation of the judicial system;

(v) develop a uniform set of accounting and budgetary accounts for all courts in the state court system;¹ and

(vi) fix the compensation of all nonjudicial personnel whose compensation is not otherwise fixed pursuant to title VIII.

(9) examine the arrangements for the use and maintenance of court facilities and supervise the purchase, distribution, exchange, and transfer of judicial equipment and supplies thereof.

(10) act as secretary to the judicial council and prepare for an annual conference of all judges of courts of record to discuss recommendations for the improvement of the administration of justice.

(11) submit an annual report to the chief justice, legislature, and governor of the activities and accomplishments of the office for the preceding calendar year.

(12) attend to other matters consistent with the powers delegated herein as may be assigned by the chief justice.

¹Some states also have the director serve as the auditor for the judicial department.

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1 *[Section 4. Appeals Court Administrator: Creation.* The departmental justice of each judicial
2 circuit, subject to the approval of the chief justice, shall appoint an appeals court administrator to
3 assist him in his administrative duties. The appeals court administrator shall serve at the pleasure of
4 the departmental justice and he shall, subject to the approval of the chief justice, employ such other
5 personnel as may be necessary to enable him to perform the duties of his office.]

6 *Section 5. General Trial Court Administrator: Creation.* The chief judge of each judicial dis-
7 trict, subject to the approval of the chief justice, shall appoint a general trial court administrator to
8 assist him in his administrative duties. The administrator shall serve at the pleasure of the chief judge
9 and he shall, subject to the approval of the [departmental justice] [chief justice], employ such other
10 personnel as may be necessary to enable him to perform the duties of his office.

11 *Section 6. [Appeals court and] General Trial Court Administrator: Qualifications, Compensa-*
12 *tion and Employees.* The [appeals court administrator and general trial court administrator]
13 [administrator] and [their] [his] employees shall have whatever qualifications may be prescribed
14 pursuant to title VIII of this act except that they shall not engage in the practice of law nor hold any
15 other office or employment. The compensation of the [appeals court and general trial court admin-
16 istrator] [administrator] and [their] [his] employees shall be prescribed pursuant to title VIII of this
17 act.

18 *Section 7. Compliance with Requests for Information.* All employees of the state court system
19 [the attorney general, and all district attorneys] shall promptly comply with the requests of the
20 director for information and statistical data bearing on the business of the courts and such other
21 information as may be needed to carry out the lawful duties of the administrative office of the
22 courts. The director shall be assisted by all [appeals court and] general trial court administrators in
23 the performance of his duties.

TITLE IV

ASSIGNMENT OF JUDICIAL DEPARTMENT PERSONNEL

1 *Section 1. Assignment Powers of Chief Justice.* The chief justice shall supervise, with the aid
2 of the director, all employees of the judicial department of the state and assign, reassign, or modify
3 assignments to various parts of the judicial department as the need may require.

4 *Section 2. Assignment Powers of [Departmental Justices and] Chief Judges.* (a) Subject to the
5 authority of and upon consultation with the chief justice, departmental justices shall have the power
6 to assign or reassign judges to conduct sessions of the respective courts in their judicial circuit as the

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1 business of those courts may require. In performing these tasks, the departmental justices shall be
2 aided by the appeals court administrator.]

3 (b) Chief judges shall have general supervisory power over judges in their courts. They shall be
4 subject to the assignment power of [departmental justices and] the chief justice as the situation may
5 require.

6 *Section 3. Compensation for Assignment or Reassignment.* Any employee of the judicial de-
7 partment, when reassigned to any court in this state on less than a permanent basis, shall serve with-
8 out additional compensation but shall be reimbursed for all reasonable expenses actually incurred as
9 a result of such reassignment.

TITLE V

RULES OF PRACTICE AND PROCEDURE

1 *Section 1. Rule Making Powers Vested in Supreme Court.* The supreme court shall make uni-
2 form rules regulating practices and procedures in all courts of the judicial department and thereafter
3 revise such rules at its discretion subject to modification by a [majority] [two-thirds] vote of each
4 house of the legislature. All rules and regulations made under this act shall, when duly promulgated,
5 have the force and effect of law.

6 *Section 2. Nature of Uniform Rules.* Uniform rules of practice and procedures shall apply to
7 all courts. The supreme court shall provide for a public hearing not less than [] days before the
8 adoption of any general rule or amendment thereof.

9 *Section 3. Criminal and Civil Procedures Rules Committee.* The supreme court may appoint a
10 criminal and civil procedures rules committee [, the members of which shall be members of the state
11 bar,] which shall assist the supreme court and the director in the preparation, revision, promulga-
12 tion, publication and administration of general rules of practice and procedure.

13 *Section 4. General Rules of Court Business.* The chief justice may prescribe uniform rules
14 governing the general business of and practice in any of the courts in the state. Such rules shall
15 become immediately effective as of the date fixed by the chief justice.

TITLE VI

JUDICIAL QUALIFICATIONS AND SELECTION

1 *Section 1. Judicial Qualifications.* All judges in this state shall be licensed to practice law in
2 this state [and shall possess the following additional qualifications]

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1 *Section 2. Judicial Nominating Commissions.* There shall be one nominating commission for
2 the supreme court [and court of appeals] and one judicial nominating commission for each general
3 trial court district. After [insert appropriate date] whenever a vacancy shall occur in the office of
4 judge in any court in this state, the governor shall fill such vacancy by appointing one of three per-
5 sons possessing the qualifications for such office who shall be nominated and whose names shall be
6 submitted to the governor by the appropriate judicial nominating commission established and organ-
7 ized as hereafter provided. All such appointments shall be for a period of [] year [s]. If the governor
8 fails for [45] days to make the appointment, [it shall be made from such nominees by the chief
9 justice] [another set of three qualified nominees shall be submitted by the nominating commission
10 to the governor].

11 *Section 3. Composition of Commissions.* Each judicial nominating commission shall consist of
12 [] members. Members of the state bar shall elect [] of their number to act as members of the
13 nominating commission in the judicial district where they reside. The governor shall appoint, subject
14 to confirmation by the legislature, [] judges, and [] citizens who are neither judges, retired
15 judges, nor members of the state bar to each judicial nominating commission in the state. [The chief
16 justice shall be an ex officio member of the judicial nominating commission for the supreme court
17 and court of appeals.] [[Departmental justices] [Chief judges] shall be ex officio members of the
18 judicial nominating commissions for the judicial districts over which they have jurisdiction.] All
19 terms shall be for [] years. [Insert language to provide for staggered terms.]

20 *Section 4. Restrictions on Members.* Members of judicial nominating commissions shall not
21 hold any other elective or salaried public office. [Members shall not be eligible for reappointment or
22 reelection to a judicial nominating commission.] No member of the commission, except members
23 appointed to the commission as judges and ex officio members, shall be eligible for appointment as
24 a judge as long as he is a member of that commission and for a period of [] years thereafter. All
25 acts of judicial nominating commissions shall be made with the concurrence of a majority of its
26 members. All commissions shall operate in accordance with rules promulgated by the supreme court.

27 *Section 5. Nominating Procedures.* In the event of a judicial vacancy, the chairman of the
28 appropriate judicial nominating commission shall notify other members of the commission and sched-
29 ule a public hearing to be held on qualified nominees for the vacancy. He shall also cause appropriate
30 notice of such hearing to be published by the various news media and make known the interest of the
31 judicial nominating commission to receive information relating to qualified applicants for the judicial
32 vacancy. Any member of the public shall be entitled to attend the public hearing to express, either
33 orally or in writing, his views concerning candidates for the judicial vacancy. After the public

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1 hearing, a judicial nominating commission shall hold any additional [confidential] meetings and make
2 any independent investigation and inquiry it deems necessary to determine the qualifications of can-
3 didates for the judicial vacancy. Thereafter, the judicial nominating commission, upon the concu-
4 rence of a majority of its members, shall recommend three qualified nominees for the judicial vacancy.
5 [If the commission cannot name three qualified nominees within [] months of the judicial va-
6 cancy, the governor, subject to the confirmation of the legislature, may appoint a qualified judge to
7 the judicial vacancy.]

8 *Section 6. Election of Judges.* (a) Any judge desiring to retain his office after initial gubernatorial
9 appointment and every [] years thereafter shall certify his candidacy to the proper election
10 officials and the secretary of state no less than [] days before the said election. At the election
11 the name of each judge who has filed such a certification shall be submitted to the voters, on the
12 ballot without party designation, on the sole question of whether he shall be retained in office for
13 another term. The elections shall be conducted in the appropriate judicial [circuits or] districts.

14 (b) The affirmative votes of a majority of qualified voters voting on the question shall retain
15 a judge in office for the prescribed term.

16 (c) Any judge failing to file a declaration of candidacy or who fails reelection shall vacate his
17 office at the expiration of his term. His vacancy shall be filled according to procedures of sections 2
18 and 5 of this title.

19 *Section 7. Compensation of Commissions.* The members of judicial nominating commissions
20 [who are public officials] shall receive no salary or other compensation for their service. [All other
21 members shall be eligible for a per diem compensation of [\$50].] All members may be reimbursed
22 for all reasonable expenses incurred in the discharge of their official duties. The budgets of all
23 nominating commissions shall be included in the judicial department operating budget.

24 *Section 8. Unlawful Influence of Commissions.* It shall be unlawful and a breach of ethics for
25 any judge, public officeholder, lawyer, or any other person or organization to attempt to influence
26 any judicial nominating commission in any manner and on any basis except by presenting facts and
27 opinions relevant to the judicial qualifications of the proposed nominees, at the times and in the
28 manner set forth in section 5 of this title. Violation of this section shall be considered as contempt
29 of the supreme court. Violation of this section by any judge of this state shall be grounds for dis-
30 cipline or removal as provided for in title VI of this act.

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TITLE VII

JUDICIAL CONDUCT

1 *Section 1. Judicial Canon of Ethics.* After due notice and hearing, the supreme court shall
2 adopt and put into effect canons of judicial ethics which shall govern the conduct of all judges.
3 Any violations of these canons shall be grounds for removal or retirement or discipline as provided in
4 sections 5 through 8 of this title.

5 *Section 2. Full-time Judges.* (a) All judges shall devote full time to their judicial duties. During
6 his term of office a judge shall not practice law nor shall he be the partner or associate of any
7 person in the practice of law. A judge shall also not hold any other employment or position of profit
8 or hold a public office under the United States, this State, or any of its civil divisions during his term
9 of office.

10 (b) Any judge violating section 2(a) of this title shall be subject to removal or discipline as
11 provided for in sections 5 through 8 of this title.

12 *Section 3. Grounds for removal and Suspension.* (a) Without recourse to the commission on
13 judicial qualifications, the supreme court shall suspend any judge from office without salary when he
14 pleads guilty or no contest or is found guilty in a general trial court of a crime punishable as a felony
15 under state or federal law or any other crime that involves moral turpitude under the law. If his
16 conviction is reversed, suspension terminates and he shall be paid his salary for the period of his
17 suspension. If his conviction becomes final, the supreme court shall remove him from his office.

18 (b) All other proceedings for removal shall be conducted through the judicial qualifications
19 commission as provided for in sections 5 through 8 of this title.

20 *Section 4. Commission on Judicial Qualifications.* A commission on judicial qualifications
21 is hereby established which shall consist of [] judges [appointed by the chief justice], []
22 members of the state bar [elected by that body], and [] citizens who shall not be judges, retired
23 judges, or persons admitted to the practice of law. Members shall be appointed for a term of []
24 years. [Insert language to provide staggered terms.] Whenever a member resigns, dies, or ceases to
25 be a member of the commission, the appointing authority as herein provided shall appoint a successor
26 for the unexpired term. The commission shall elect one of its members to serve as a chairman for the
27 term prescribed by the commission.

28 *Section 5. Grounds for Retirement or Removal.* Any judge, in accordance with the procedures
29 described in this title, may by action of the supreme court be:

30 (1) retired from office for any physical or mental disability seriously interfering with the per-
31 formance of his duties which is, or is likely to become, of a permanent character.

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(2) disciplined or removed from office for action occurring within [] years before the commencement of his current term which constitutes willful misconduct in office, willful and persistent failure to perform his duties, habitual intemperance, unlawful influence of a judicial nominating commission, or any other conduct deemed prejudicial to the administration of justice or that brings the judicial office into disrepute.

Section 6. Powers of the Commission. (a) The commission shall have, but not be limited to, the following powers:

(1) to hold hearings and subpoena witnesses and exercise requisite process powers;

(2) to require a judge to submit to physical or mental examination by qualified medical experts,

(3) to make independent investigations either by members of the commission, or by special investigators employed by the commission or by the office of attorney general;

(4) to hold confidential hearings with all parties involved in the proceedings before the commission;

(5) to employ investigators, medical experts and such other employees as the commission in its discretion determines to be necessary to carry out its functions and purposes.

(b) All personnel of the judicial department of this state shall cooperate with and give reasonable assistance and information to the commission and any authorized representative thereof in connection with any investigations or proceedings within the jurisdiction of the commission. It also shall be the duty of any law enforcement officer of this state to serve process and execute all lawful orders of the commission throughout the state.

Section 7. Procedures of the Commission. (a) The commission on its own motion or on the complaint of any citizen may initiate proceedings for the retirement, discipline, or removal of any judge in the state. All citizen complaints shall be directed to the commission or to any member of the commission. No specified form of complaint shall be required.

(b) The commission may make such investigation as it deems necessary to verify or refute the substance of the complaint. After such investigation, the commission may order a confidential hearing to be held before it concerning the complaint. After confidential hearing, the commission may recommend to the supreme court the retirement, removal, or discipline, as the case may be, of the judge against whom the complaint is filed.

(c) The supreme court shall review the record of the commission proceedings and in its discretion may permit the introduction of additional evidence. It shall make whatever determinations it finds just and proper, and may order the removal, discipline, or retirement of the judge, or may wholly reject the recommendation. Upon an order for retirement, the judge shall thereby be retired

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with the same rights and privileges as if he had retired pursuant to other provisions of law relating to retirement of judges. Upon an order for removal, the judge shall be removed from office and his salary shall cease from the date of such order. He shall be ineligible for judicial office for [] years.

(d) The director shall be the commission's executive secretary. He shall certify each order of the commission to the governor and the chief justice.

(e) No act of the commission shall be valid unless concurred in by a majority of its members.

(f) All papers filed with and proceedings before the commission shall be confidential and the record filed by the commission may become public record with the consent of the judge being investigated. No members or employees of the commission shall disclose or use any commission records, files, or communications in any other than their official duties.

(g) No judge who is a member of the commission or of the supreme court shall sit on the commission or the court in any proceedings involving his own discipline, removal or retirement.

Section 8. Rights of Judicial Defendants in Commission Action. (a) In any proceeding involving a judge's discipline, removal, or retirement, the judge shall have the right and reasonable opportunity to defend himself against complaints by the introduction of evidence, to be represented by counsel, and to examine and cross-examine witnesses. He shall also have the right to the issuance of subpoenas for attendance of witnesses to testify or produce books, papers, or other evidentiary matter.

(b) In any proceedings under this act, the judge under investigation and his counsel shall be given [] days advance notice of such proceedings.

(c) A judge is disqualified from acting as a judge, without loss of salary, while there is pending a recommendation to the supreme court by the commission for his removal or retirement.

Section 9. Voluntary Retirement for Disability. Any judge desiring to retire on the grounds of mental or physical disability shall certify to the commission his request for retirement and the nature of his disability; and the commission may order a medical examination and make a report and recommendation.

Section 10. Budget and Compensation of Commission. The judicial department shall be responsible for preparing and presenting to the legislature proposed annual budgets for the commission. Members of the commission [who hold other salaried public office] shall serve without compensation. [Other members shall be eligible for a per diem compensation of [\$50].] Members shall be reimbursed for all reasonable expenses incurred by them in connection with their duties as members of the commission.

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TITLE VIII

COURT PERSONNEL AND FINANCES

1 *Section 1. State Responsibility for Court Finances.* After [insert appropriate date] the legisla-
2 ture shall appropriate funds for the expenses of the judicial department.

3 *Section 2. Court Personnel and Compensation.* (a) After [insert appropriate date] the chief
4 justice shall prescribe by rule a personnel classification plan for all courts in the judicial department.
5 Such a plan shall include: (i) a basic compensation plan of pay ranges to which classes of positions
6 shall be assigned and may be reassigned; (ii) qualifications for all nonjudicial positions and classes of
7 positions which shall include education, experience, special skills, and legal knowledge; (iii) an
8 outline of duties to be performed in each position and class of positions; (iv) the number of full-time
9 and part-time positions, by position title and classification, in each court in the state; (v) the proce-
10 dures for and regulations governing the appointment and removal of nonjudicial personnel; (vi) the
11 procedures for and regulations governing the promotion of nonjudicial personnel; and (vii) the
12 amount, terms, and conditions of sick leave and vacation time and fringe benefits for court personnel,
13 including annual allowance and accumulation thereof, and hours of work and other conditions of
14 employment.

15 (b) The chief justice, in promulgating rules as set forth in this section, shall take into account
16 the compensation and classification plans, vacation and sick leave provisions, and other conditions of
17 employment applicable to the employees of the executive and legislative departments. The chief
18 justice shall be aided by the administrative office of the courts in the implementation of this section.

19 *Section 3. Operating Budgets.* (a) The director shall, subject to the approval of the chief
20 justice, prepare annually a consolidated operating budget for all courts in the state to be known as
21 the judicial department operating budget. He shall be assisted in this task by all [appeals court and]
22 general trial court administrators.

23 (b) The director shall prepare the consolidated court budget according to procedures prescribed
24 by the [state budget officer] [and the joint budget committee of the legislature]. Budget requests
25 and other additional information as requested shall be transmitted to the [state budget officer] [and
26 the joint budget committee of the legislature] by [insert appropriate date]. The governor shall
27 include his recommendations for court appropriations by [insert appropriate date] and the legislature
28 shall make appropriations to courts based on an evaluation of the budget request, the governor's
29 recommendations and the availability of state funds.

30 (c) The director, subject to the approval of the chief justice, shall prescribe the financial

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1 management procedures to be used in all courts of the judicial department. These procedures shall
2 include but not be limited to: (1) the preparation of budget requests, (2) the disbursement of funds
3 appropriated to the judicial department, (3) the purchase of forms, supplies, equipment, and other
4 items as authorized in the judicial department operating budget, and (4) any other matter relating to
5 fiscal administration.

6 *Section 4. Capital Budgets.* (a) The director shall, subject to the approval of the chief justice,
7 prepare a consolidated capital budget for all courts in the state. He shall be assisted in this task by all
8 [appeals court and] general trial court administrators.

9 (b) The director shall prepare the consolidated capital budget according to procedures pre-
10 scribed by the [state budget officer] [and the joint budget committee of the legislature]. Budget
11 requests and other additional information as requested shall be transmitted to the [state budget offi-
12 cer] [and the joint budget committee] by [insert appropriate date]. The governor shall include his
13 recommendations for court capital expenditures by [insert appropriate date] and the legislature
14 shall make appropriations or authorize bond issues for court capital expenditures based on an evalua-
15 tion of the budget request, the governor's recommendations and the availability of state funds.

16 (c) The consolidated capital budget for the judicial department shall include but not be
17 limited to:

18 (1) projections of additional court facilities required for each court;

19 (2) estimated costs of the additional facilities and whether these facilities will include space to
20 be used by other state agencies or governmental units of the state; and

21 (3) a detailed report on the present court facilities currently in use and the reasons for their
22 inadequacy. The capital budget shall also indicate the relative priority of the capital construction
23 needs for each court for the next [] years.

24 (d) The director, subject to the approval of the chief justice, may enter into leasing agreements
25 with local units of government or other departments of the state government when joint construction
26 of capital facilities is authorized. The leasing agreement shall provide for the payment of state funds
27 for that portion of the construction costs related to the operation of the courts.

TITLE IX

JUDICIAL RETIREMENT

1 *Section 1. Mandated Retirement.* All judges shall retire at the age of seventy. They shall be
2 included in a retirement plan of the state.

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1 *Section 2. Eligibility for Reappointment.* All retired judges shall be eligible for reappointment
2 by the chief justice as an active retired judge. An active retired judge shall be subject to the same
3 judicial rules and regulations as other judges. He shall act only in such cases and matters and hold
4 court only at such times as he may be directed and assigned by the chief judge of his court. In no
5 case shall a judge serve on the bench after [eighty] years of age.

6 *Section 3. Retirement System.*² (a) After [insert appropriate date] the director, subject to
7 the approval of the supreme court [and the state retirement board] shall promulgate the terms and
8 conditions of retirement for judicial department personnel. They shall include, but not be limited
9 to:

10 (1) eligibility for retirement,

11 (2) basis of retirement compensation for the employees of the judicial department and their
12 survivors,

13 (3) conditions of receiving retirement pay as concerns outside employment,

14 (4) conditions for retirement for disability,

15 (5) any other matter that may be properly related to the determination of retirement pay.

16 In defining the terms and condition of retirement for personnel of the judicial department, the
17 director shall take into account the retirement plans applicable to employees of the executive and
18 legislative departments.

19 (b) After [insert effective date of act] all employees of local judicial agencies shall be deemed
20 to be employees of the judicial department. These employees shall receive full credit for the time
21 employed by local judicial agencies in computing the number of years of service required to receive
22 pension benefits under the [insert appropriate state retirement plan].

TITLE X

MISCELLANEOUS

1 *Section 1. Effective Date.* [Insert effective date.]

2 *Section 2. Severability.* [Insert severability clause.]

3 *Section 3. Transition.* [Insert appropriate transition provisions.]

² Some States may wish to integrate the judicial personnel retirement system with an existing retirement system.

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OMNIBUS PROSECUTION ACT

The relationship between the attorney general and local prosecuting attorneys varies widely from State to State. A few States vest complete prosecutorial authority in the attorney general, at the same time, a few give him no authority whatsoever in criminal cases. Between these extremes, most States have established a range of relationships, including mutually exclusive areas of criminal authority, attorney general advice and assistance to local prosecutors, and direct control over local prosecuting attorneys by the attorney general.

The purpose of the following proposed legislation is to strengthen statewide coordination of prosecutorial activity by providing for general supervision by the attorney general of the prosecution component of a State's criminal justice system. Section 2 contains the necessary definitions. It should be recognized that the definition of "local prosecuting attorney" will vary from State to State, in determining the proper titles, however, it should be kept in mind that the local prosecutor should have primary responsibility for instituting criminal actions within his jurisdiction. Section 3 of the bill provides a number of actions that the attorney general may take vis-a-vis local prosecutors at his discretion; on the request of the local prosecuting attorney, the governor, or a grand jury; or when the local prosecutor fails to apply properly a statewide policy. These actions include consultation, technical assistance, and intervention. This section also embodies necessary safeguards in connection with the exercise of the attorney general's authority in criminal investigations. Section 4 authorizes the attorney general to submit periodically to the legislature local prosecution district reorganization plans, and requires local prosecuting attorneys of multi-county districts to appoint at least one assistant. Section 5 requires the attorney general to prescribe minimum standards for local prosecutors' offices, and authorizes State financial aid to offices certified as meeting these standards to cover part of the costs related to the investigation and prosecution of criminal offenses. Section 6 establishes a State Council of Prosecutors and provides for interagency cooperation, and Section 7 deals with reporting requirements. Section 8 contains procedures for the removal of local prosecuting attorneys.

This draft bill draws upon the American Bar Association's "Model Department of Justice Act" and New Jersey's "Criminal Justice Act of 1970." In some States, constitutional amendments may be required to implement various sections of this act.

Suggested Legislation

[Title should conform to state requirements. The following is a suggestion: "An act providing for the general supervision by the attorney general of criminal law enforcement throughout the state."]

[Be it enacted, etc.]

1 Section 1. *Findings and Purpose.* The legislature hereby finds and declares that:

2 (1) The increasing rate of crime presents a serious threat to the political, social, and
3 economic institutions of the state and helps bring about a loss of popular confidence in the
4 agencies of government, and

5 (2) Fragmented administration of the prosecution function has reduced the effectiveness of
6 the crime prevention and control efforts of the state and its political subdivisions, and has hindered
7 the consistent application of criminal law throughout the state.

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1 It is the purpose of this act to encourage cooperation among state and local prosecuting
2 attorneys and to provide for the general supervision of criminal justice by the attorney general as
3 chief law officer of the state, in order to secure the benefits of a uniform and efficient enforce-
4 ment of the criminal law and the administration of criminal justice throughout the state.

5 *Section 2. Definitions. As used in this act:*

6 (1) "Local prosecuting attorney" means a [county or district prosecutor, or a county
7 attorney, district attorney, state's attorney, circuit attorney, city attorney, corporation counsel, or
8 solicitor]¹ having primary responsibility for instituting criminal actions.

9 (2) "Law enforcement officer" means a police officer, sheriff, or other individual who is
10 employed full time by the state or a unit of local government to preserve order and enforce the laws.

11 *Section 3. Powers and Duties of the Attorney General.*

12 (a) The attorney general shall consult with and advise the several local prosecuting
13 attorneys and may provide technical assistance in matters relating to the duties of their office.
14 He shall maintain a general supervision over local prosecuting attorneys with a view to obtaining
15 effective and uniform enforcement of the criminal laws throughout the state.

16 (b) Any local prosecuting attorney may request in writing the assistance of the attorney
17 general in the conduct of any investigation, criminal action, or proceeding. The attorney general
18 may thereafter take whatever action he deems necessary to assist the local prosecuting attorney in
19 the discharge of his duties.

20 (c) Whenever requested in writing by the governor, the attorney general shall, and when-
21 ever requested in writing by a grand jury of a county or by [insert other appropriate agencies],
22 the attorney general may intervene in any investigation, criminal action, or proceeding instituted
23 by a local prosecuting attorney, and may appear for the state in any court or tribunal for the
24 purpose of conducting such investigations, criminal actions, or proceedings as shall be necessary
25 for the protection of the rights and interests of the state.

26 (d) Whenever in his opinion the interests of the state will be furthered by so doing, the
27 attorney general may, and whenever a local prosecuting attorney refuses to apply a statewide
28 policy or has applied it in a manner that distorts its purposes, the attorney general shall, intervene
29 in or initiate any investigation, criminal action, or proceeding. In such instances, the attorney
30 general may appear for the state in any court or tribunal for the purpose of conducting such
31 investigations, criminal actions, or proceedings as shall be necessary to promote and safeguard the
32 public interests of the state and secure the enforcement of the laws of the state. [The attorney

¹ Each state should insert the appropriate title of its local prosecuting attorneys.

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1 general may in his discretion act for any local prosecuting attorney in representing the interests of
2 the state in any and all appeals and applications for post-conviction remedies.]

3 (e) The attorney general shall prosecute the criminal business of the state in any county or
4 judicial district having no local prosecuting attorney.

5 (f) Whenever the attorney general shall assist, intervene or participate in, or initiate or
6 conduct any criminal action or proceeding as heretofore provided in subsections (b) and (c) of
7 this section, he shall be authorized to exercise all the powers and perform all the duties the local
8 prosecuting attorney would otherwise be authorized or required to perform, including the investi-
9 gation of alleged crimes, the attendance before the criminal courts and grand juries, the prepara-
10 tion and trial of indictments for crimes, and the representation of the state in all proceedings in
11 criminal cases on appeal or otherwise in the courts of this state. Subject to the availability of
12 funds, he may appoint temporary assistants, aides, investigators, or other personnel.

13 (g) The powers and duties conferred upon or required of the attorney general by this act
14 shall not be construed to supplant or deprive local prosecuting attorneys of any of their authority
15 in respect to criminal prosecutions, or relieve them from any of their duties to enforce the
16 criminal laws of the state.

17 *Section 4. Local Prosecution Districts.* (a) Local prosecuting attorneys of multi-county
18 districts shall appoint at least one assistant [in each county] to coordinate the prosecution of
19 crimes under state law and handle all stages of felony proceedings.

20 (b) So as to warrant at least one full-time local prosecuting attorney and the supporting
21 staff necessary for effective performance of the prosecution function, the attorney general shall
22 submit periodically to the legislature a plan revising existing or establishing new local prosecution
23 districts on the basis of population, caseload, judicial district boundaries, and other relevant
24 factors.²

25 *Section 5. Minimum Standards; Financial Assistance.* (a) In order to assure the efficient
26 operation of offices of local prosecuting attorneys, the attorney general shall prescribe minimum
27 standards with regard to personnel, procedures, and other appropriate matters. Offices of local
28 prosecuting attorneys shall be given reasonable opportunity to meet such minimum standards. On
29 or before [the last day of each fiscal year], the attorney general shall certify to the [state dis-
30 bursing officer] those offices of local prosecuting attorneys meeting these standards. The [state
31 disbursing officer] shall make payments, from funds appropriated for that purpose, to the

² In some states, a constitutional amendment may be necessary to implement this subsection

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1 appropriate [units of local government] to reimburse them for [fifty] percent of the costs incurred
2 during the ensuing fiscal year for activities related to the investigation and prosecution of criminal
3 offenses conducted by certified offices of local prosecuting attorneys.

4 *Section 6. State Council of Prosecutors and Interagency Cooperation.* (a) The attorney
5 general shall establish a state council of prosecutors composed of all local prosecuting attorneys,
6 which shall meet on a regular basis to develop guidelines for local prosecuting attorneys and assure
7 that local prosecution policies and practices meet state minimum standards and are consistent from
8 jurisdiction to jurisdiction.

9 (b) The attorney general may, from time to time, and as often as may be required, call
10 into conference the local prosecuting attorneys, the chiefs of police of the several counties and
11 municipalities, and any other law enforcement officers of the state or such of them as he may
12 deem advisable, for the purpose of discussing the duties of their respective offices with a view to
13 the adequate and uniform enforcement of the criminal laws of this state.

14 (c) All local prosecuting attorneys and local police officers shall cooperate with and aid
15 the attorney general in the performance of his duties. All state and local law enforcement officers
16 shall cooperate with and aid the attorney general and the several local prosecuting attorneys in the
17 performance of their respective duties.

18 *Section 7. Reports.* (a) The attorney general shall annually submit to the governor and the
19 legislature a report setting forth the activities of his office during the preceding calendar year,
20 together with suggestions and recommendations for the adequate and uniform enforcement of the
21 criminal laws of the state. The attorney general shall include in his report an abstract of the annual
22 reports of the several local prosecuting attorneys.

23 (b) Each local prosecuting attorney shall annually submit to the attorney general a written
24 report for the last preceding [fiscal] [calendar] year, covering such items of information and such
25 dispositions of complaints, investigations, criminal actions, and proceedings as the attorney general
26 shall prescribe. The attorney general may also require the several local prosecuting attorneys to
27 submit, from time to time, reports as to any matters pertaining to the duties of their office.

28 (c) The attorney general may make studies and surveys of the organization, procedures,
29 and methods of operation and administration of all law enforcement agencies within the state,
30 with a view toward preventing crime, improving the administration of criminal justice, and securing
31 the improved enforcement of the criminal law. Such studies may include the procedures and re-
32 sults of sentencing, where sentences are open to discretion.

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1 *Section 8. Removal of Local Prosecuting Attorneys.* In addition to any and all methods now
2 provided by law for removal from office, the attorney general, after receipt of a valid complaint or
3 on his own motion, may initiate proceedings for the removal of any local prosecuting attorney in
4 the state by the supreme court. Upon receipt of a valid complaint, the attorney general shall make
5 such investigation as he deems necessary to verify or refute the substance of the complaint. After
6 such investigation, the attorney general may order a confidential hearing to be held. After investi-
7 gation and hearing, the attorney general may petition the supreme court for the removal from
8 office of any prosecuting attorney. The supreme court shall review the record of the attorney
9 general's proceedings and in its discretion may permit the introduction of additional evidence. It
10 shall make whatever determination it finds just and proper, and may order the removal of any
11 local prosecuting attorney or may wholly reject the petition of the attorney general.

12 *Section 9. Laws Repealed.* All acts or parts of acts inconsistent with the provisions of this
13 act are hereby repealed.

14 *Section 10. Separability.* [Insert separability clause.]

15 *Section 11. Effective Date.* [Insert effective date.]

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